

CROSSING THE THRESHOLD: EQUAL MARRIAGE RIGHTS FOR LESBIANS AND GAY MEN AND THE INTRA-COMMUNITY CRITIQUE

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INTRODUCTION

How the world can change,
It can change like that,
Due to one little word:
"Married."¹

For the first time since an ancient spate of cases in the early 1970s,² lesbians and gay men today are in court challenging the denial of our equal right to marry. For the first time ever, with the Hawaii Supreme Court's recent ruling in *Baehr v. Lewin*,³ we stand on the verge of victory, with all

1. JOHN KANDER & FRED EBB, *Married, on CABARET* (First Night Records 1986).

2. *E.g.*, Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973) (holding that women are not entitled to have issued to them a license to marry each other); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972) (holding that the statute governing marriage does not authorize marriage between persons of the same sex); Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974) (holding that a provision against same-sex marriages did not violate the constitutional provision that equality of rights under the law shall not be denied or abridged on account of sex). I refer to these cases as ancient because they arose very early in the modern lesbian and gay civil rights movement. They were decided prior to considerable evolution in legal doctrines regarding equal protection and the right to marry. *See, e.g.*, Turner v. Safley, 482 U.S. 78, 95 (1987) (holding that prisoners have a right to marry despite their inability to partake in some elements of marriage); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (mentioning need for heightened standard of review for legislative classifications based on gender); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (holding that "private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect"); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) ("[T]he right to marry is of fundamental importance for all individuals."). When the early marriage cases were litigated, courts and society had not yet experienced the lesbian and gay movement's breakthroughs in the 1980s, AIDS, or the sea change they wrought in social acknowledgment of the reality and diversity of the lives of gay people.

3. 852 P.2d 44, *clarified on grant of reconsideration in part*, 852 P.2d 74 (Haw. 1993) (holding that the denial of marriage licenses to same-sex couples appears to violate the state constitutional guarantee of equal protection).

its implications. Those opposing our efforts fall into two camps: presumptively non-gay⁴ and gay.⁵ As Senior Staff Attorney for Lambda Legal Defense and Education Fund, and as co-counsel in *Baehr v. Lewin*,⁶ the pending marriage case in Hawaii, I have ample opportunity to address the standard non-gay arguments against equal marriage rights.⁷ Throughout our litigation, the state has proffered these arguments to justify its imposition of a "different-sex restriction" on marital choice.⁸ Accordingly, in this article, I will not dwell at any length on the response to the official, "non-gay," or anti-gay opposition to our equal rights. I invite those interested in hearing our response to the state attorneys to read our briefs.⁹

Instead, I would like to address here some of the opposition by my lesbian and gay colleagues to our fight for the right to marry. It may surprise non-gay readers, as well as many gay readers, that a small but influential group of lesbian and gay activists urges that the gay movement not seek equal marriage rights, and is not moved by the victory in *Baehr*, a breakthrough case that most might see as gay people's *Loving v. Virginia*.¹⁰ Others might expect a difference of views and tactics in a community as varied and diffused as the gay community. And, of course, just a few years ago, whatever one's views, few expected that we could persuade courts and society to take this demand for justice and equality seriously, that we could

4. I use the term *presumptively non-gay* because that is the official voice, the "default characterization," in our heterosexual society. See Janet E. Halley, *The Construction of Heterosexuality*, in *FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY* 82, 83 (Michael Warner ed., 1993) ("Heterosexuality . . . is a highly unstable, default characterization for people who have not marked themselves or been marked by others as homosexual.") In the spirit of the characteristically brilliant analysis in Part I of Halley's piece, I employ the first-person voice throughout this article, which I intend to be a contribution to what I call the intra-community debate in the lesbian and gay community. I am, however, mindful of Mark Twain's admonition that "the only people who should use the word 'we' are editors, kings, and persons with tapeworms."

5. "Gay marriage is a radical notion for straight people and a conservative notion for gay ones. After years of being sledgehammered by society, some gay men and lesbian women are deeply suspicious of participating in an institution that has 'straight world' written all over it." Anna Quindlen, *Evan's Two Moms*, N.Y. TIMES, Feb. 5, 1992, at A23 (calling for equal marriage rights for lesbians and gay men).

6. 852 P.2d 44, *clarified on grant of reconsideration in part*, 852 P.2d 74 (Haw. 1993). See discussion *infra* part I.A. *Baehr* was initially brought in 1991 by Honolulu attorney Daniel R. Foley of the law firm of Partington & Foley, after national organizations such as Lambda proved internally deadlocked and unwilling to take the case. Lambda remained supportive and involved behind the scenes, filed an *amicus* brief, and, after a change in ideology and regime, was again invited to enter the case. I am now co-counsel with Dan Foley.

7. See discussion *infra* part I.B.

8. *Baehr* has been remanded to the lower court to give the State an opportunity, under the strict scrutiny standard, to present compelling interests for such gender discrimination and to show that its means of achieving those interests is "narrowly tailored." *Baehr*, 852 P.2d at 67-68. For a fuller discussion of *Baehr*, see *infra* part I.A.

9. On file with Lambda Legal Defense & Education Fund, 666 Broadway, 12th Floor, New York, NY 10012.

10. 388 U.S. 1 (1967) (striking down Virginia's same-race restriction on an individual's choice of marital partner). See *infra* notes 33-35 and accompanying text.

"mainstream" social consideration of same-sex couples' marriages, or that equal marriage rights for gay people would be close to realization so soon.

Nevertheless, there is still some intra-community opposition and resistance to fully committing to the work at hand. I will frame much of this essay as a response to a piece by Professor Nancy D. Polikoff, a lesbian academic and advocate whose work on a range of issues I much respect.¹¹ A colleague in the gay rights movement, Professor Polikoff has been perhaps the most consistent intra-community critic of my views in favor of marriage challenges. Her intellectual opposition has continued despite the victory in *Baehr*.

I believe an examination of the intra-community debate over gay people's marriage rights may contribute to an understanding of how social change occurs and of the roles played by the law, the courts, and impact litigation as compared to other engines of social change.¹² Such understanding, of course, is of importance to gay and non-gay activists and legal theorists alike. Most important, I hope that participating in intra-community discussion here will make it easier for lesbians, gay men, and our allies to overcome inevitable tactical differences, enabling us to do the historic work at hand nationwide to win and keep our equal marriage rights.

I join here in this intra-community discussion despite my belief that the time for a debate over whether lesbians and gay men should seek our

11. Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535 (1993). Polikoff's article, to which this article responds, is itself in turn cast primarily as a response to articles by two of our mutual colleagues in the gay rights legal world: Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Legal Inquiry*, 1 LAW & SEXUALITY: A REVIEW OF LESBIAN AND GAY LEGAL ISSUES 9 (1991) and William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993). Each of these is essential reading.

Those interested in the issues I discuss here should also read Harlon L. Dalton, *Reflections on the Lesbian and Gay Marriage Debate*, 1 LAW & SEXUALITY: A REVIEW OF LESBIAN AND GAY LEGAL ISSUES 1 (1991); Otis R. Damslet, Note, *Same-Sex Marriage*, 10 N.Y. L. SCH. J. HUM. RTS. 555 (1993); Nitya Duclos, *Some Complicating Thoughts on Same-Sex Marriage*, 1 LAW & SEXUALITY: A REVIEW OF LESBIAN AND GAY LEGAL ISSUES 31 (1991); Mary C. Dunlap, *The Lesbian and Gay Marriage Debate: A Microcosm of Our Hopes and Troubles in the Nineties*, 1 LAW & SEXUALITY: A REVIEW OF LESBIAN AND GAY LEGAL ISSUES 63 (1991); Steven K. Homer, Note, *Against Marriage*, 29 HARV. C.R.-C.L. L. REV. 505 (1994); Claudia A. Lewis, *From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage*, 97 YALE L.J. 1783 (1988); Richard Mohr, *The Case for Gay Marriage*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 301 (1994). I will attempt not to duplicate the range of views set forth in these important articles, so many of which I share.

12. A full consideration of the debate over the role of the courts in effecting social change is beyond the scope of this essay, but clearly should inform our social change work. See, e.g., Gene B. Sperling, *Does the Supreme Court Matter?*, AM. PROSPECT, Winter 1991, at 91; Cass R. Sunstein, *Constitutional Politics and the Conservative Court*, AM. PROSPECT, Spring 1990, at 51. See also GERALD N. ROSENBERG, *THE HOLLOW HOPE* (1991). However one comes out on the question of whether courts and test cases are effective agents of social change, two things at least are clear: victory in *Baehr* will have enormous consequences, and victory in court alone will not be enough.

equal marriage rights has passed.¹³ Because lesbians and gay men are on the verge of winning our equal marriage rights, it seems to me that we must now unite in preparing to protect and build on that victory.

We know there will be a backlash against us following a final win in Hawaii.¹⁴ As Martin Luther King, Jr. wrote in *Why We Can't Wait*, "We must use time creatively, in the knowledge that the time is always ripe to do right."¹⁵ Since, as King put it, "[i]n this Revolution, no plans have been written for retreat," we must ready ourselves to defend our victory and advance toward other goals.¹⁶

I

BAEHR V. LEWIN OPENS THE DOOR TO EQUAL MARRIAGE RIGHTS FOR LESBIANS AND GAY MEN¹⁷

Why are people gay, all the night and day,
Feeling as they never felt before?

. . . .

Love is sweeping the country.
Waves are hugging the shore.
All the sexes, from Maine to Texas,
Have never known such love before.¹⁸

On May 5, 1993, while most Americans had their limited gay-issue attention span focused on Washington, D.C. and the rumblings from the congressional hearings on anti-gay discrimination in the military, on the other

13. See Evan Wolfson, *No Time For a Luau*, *ADVOC.*, July 26, 1994, at 5. As I wrote then:

When Ben Franklin emerged from the Constitutional Convention, he was asked, "What kind of government have you given us?" His answer: "A republic, if you can keep it." The right to marry is the coming battleline. For gay people, history is upon us now; we have at best two years lead time in which to show that we can not only win, but keep, our rights and our equal place in society.

14. We expect a backlash because the radical right continually mounts assaults on all our basic equal rights, including even our fundamental right to participate in the political process. See *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, No. C-1-93-773, 1994 WL 442746 at 10. (S.D. Ohio Aug. 9, 1994) (invalidating charter amendment intended to repeal and prevent civil rights protections for lesbians and gay men).

15. MARTIN LUTHER KING, JR., *WHY WE CAN'T WAIT* 86 (1963).

16. *Id.* at 133.

17. Part I is based on an edited, updated version of an article in Lambda's newsletter on the *Baehr* victory. See Evan Wolfson, *Hawaii Supreme Court Paves Way for Same-Sex Marriage*, *LAMBDA UPDATE*, Summer 1993, at 1. That article summarized our goal in the marriage challenges, and thus the position and analysis that Polikoff considers in error. It also exemplified our rhetoric in litigating for equal marriage choice, an issue that Polikoff demands we examine. Polikoff, *supra* note 11, at 1541-46, 49.

18. GEORGE & IRA GERSHWIN, *Love is Sweeping the Country, on OF THEE I SING* (Broadway Angel Records 1952).

side of the country the earth moved. *Baehr v. Lewin*,¹⁹ the landmark decision by the Hawaii Supreme Court paving the way for recognition of gay people's equal marriage rights, was nothing less than a tectonic shift, a fundamental realignment of the landscape, possibly the biggest lesbian and gay rights legal victory ever.

A. *Baehr v. Lewin*

In *Baehr*, a court for the first time took a giant step toward allowing lesbians and gay men to marry. The case began when three same-sex couples — Ninia Baehr and Genora Dancel, Pat Lagon and Joseph Melillo, and Antoinette Pregil and Tammy Rodrigues — were denied marriage licenses by the State. Ruling without any kind of evidentiary hearing or record, the lower court rejected the couples' constitutional challenge to this "different-sex restriction" imposed by the State on their choice of a marital partner. The lower court applied the lowest level of judicial review, concluding that the restriction had a rational basis because the denial of gay people's right to marry "is obviously [*sic*] designed to promote the general welfare interests of the community by sanctioning traditional man-woman family units and procreation."²⁰

Holding that the refusal to issue marriage licenses to same-sex couples appeared to violate the state constitutional right to equal protection,²¹ the state supreme court reversed the lower court's decision. In a plurality opinion, the court ordered a trial in which the State would have to come up with "compelling" reasons for discriminating, not just the unsubstantiated

19. *Baehr v. Lewin*, 852 P.2d 44, *clarified on grant of reconsideration in part*, 852 P.2d 74 (Haw. 1993).

20. *Baehr v. Lewin*, No. 91-1394-05, slip op. at 5-6 (Haw. Ct. App. Oct. 1, 1991) *rev'd and remanded*, 852 P.2d 44, *clarified on grant of reconsideration in part*, 852 P.2d 74 (Haw. 1993). Governmental actions that burden individuals unequally but are not based on a "suspect" classification or which are not invasive of a "fundamental right" need only be "rationally related to a legitimate governmental purpose" to survive judicial scrutiny. *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985). Where either a fundamental right, such as the right to marry, or a "suspect" classification, such as (in Hawaii) sex, is at stake, a court must apply heightened or even "strict" scrutiny. The government must then either adduce a "compelling" interest that is narrowly tailored to the purpose at issue, or cease discriminating. *Baehr v. Lewin*, 852 P.2d 44, 67, *clarified on grant of reconsideration in part*, 852 P.2d 74 (Haw. 1993). Because the lower court erroneously applied only the lowest level of review, neither the court nor the State ever defended the State's assertions regarding procreation and so-called "traditional man-woman family units," or explained how denying gay people their equal rights promoted these or any other State objectives.

21. *Baehr*, 852 P.2d at 68.

repetitions of the usual anti-gay arguments upon which the State had always been able to rely.²² Three weeks later, in a subsequent ruling clarifying the scope of the remand, a majority of the court adopted the approach of the plurality.²³

Under the strict scrutiny standard set out by the court, and with its recognition that "constitutional law may mandate, like it or not, that customs change with an evolving social order,"²⁴ it appears virtually certain that the state will not be able to defend on remand its denial of licenses based on sex. In Hawaii, then, lesbians and gay men seeking their equal right to marry may have begun to cross the threshold.

The court's ruling was as ingenious as it was thrilling. Hawaii, like the U.S. and all the other states, has a constitutional provision requiring that the government treat people equally, without prejudice. Hawaii's provides:

No person shall be deprived of life, liberty, or property without due process of law, nor be denied the equal protection of the laws . . . or be discriminated in the exercise thereof because of race, religion, sex, or ancestry.²⁵

The enumeration of sex as an explicitly protected category did for Hawaii what the proposed Equal Rights Amendment (ERA)²⁶ would have done for the federal constitution: it provided the strongest possible legal weapon against gender discrimination in all forms. In *Baehr v. Lewin*, the court used that weapon.

Noting that "[p]arties to a same-sex marriage could theoretically be either homosexuals or heterosexuals,"²⁷ Justice Steven H. Levinson wrote that, given the evident state discrimination before the court, the sexual orientation of the plaintiffs was irrelevant.²⁸ Perhaps as an act of political

22. *Id.*; see also *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, No. C-1-93-773, 1994 WL 442746 at 9 (S.D. Ohio Aug. 9, 1994) (arguments made in support of radical right anti-civil rights initiative consist of the same litany of anti-gay assertions characterized by court as "unreliable data, irrational misconceptions, and insupportable misrepresentations about homosexuals"); *Meinhold v. Dep't of Defense*, 808 F. Supp 1455, 1458 (C.D. Cal. 1993) (stating that the government's justifications for its anti-gay policy based on "cultural myths and false stereotypes"), *remanded on other grounds*, 991 F.2d 803 (9th Cir. 1993).

23. Upon the State's motion for an order clarifying the scope of the remand, a majority of the court declared that the sole issue before the lower court on remand is whether the "different-sex restriction" can survive "strict scrutiny." *Baehr*, 852 P.2d at 74-75 (Justice Paula Nakayama joining Chief Justice Ronald Moon and Justice Steven Levinson, also joined in part by concurring panelist Chief Judge James Burns).

24. *Baehr*, 852 P.2d at 63.

25. HAWAII CONST. art. I, § 5 (emphasis added).

26. H.R.J. Res. 208, S.R.J. 8, 92d Cong., 1st Sess. (1971) Congress passed the ERA on March 23, 1972. CONG. QUARTERLY 692 (March 25, 1972). Hawaii was the first state to ratify the amendment, acting less than two hours after the Senate vote. 118 CONG. REC. H2423 (daily ed. March 23, 1972).

27. *Baehr v. Lewin*, 852 P.2d 44, 52 n.11, *clarified on grant of reconsideration in part*, 852 P.2d 74 (Haw. 1993).

28. *Id.* at 54 n.14.

savvy, the court so far has declined to frame the case as primarily a matter of gay rights, equal protection for gay people, or the right of gay people to marry.²⁹ Indeed, the court has for now rejected our claim that denial of one's ability to choose a same-sex spouse violates substantive constitutional guarantees such as the right to privacy, the right of personal liberty, and the fundamental right to marry as such.³⁰

Instead, the court held: "It is the state's regulation of access to the status of married persons, on the basis of the applicants' sex, that gives rise to the question whether [they] have been denied the equal protection of the laws. . . ."³¹ For now at least, the court has thus carefully stepped around the minefield left by those who seek to delegitimize privacy analysis,³² resting its historic decision on the surer footing of a solid, enumerated textual foundation.

29. *Id.* at 54-55. *But see* Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, No. C-1-93-773, 1994 WL 442746, at *17 (S.D. Ohio Aug 9, 1994) (holding that in a case involving a measure targeting lesbians and gay men per se, sexual orientation is a "quasi-suspect classification" warranting heightened scrutiny).

30. *Baehr*, 852 P.2d at 55-57. I continue to believe that this portion of the court's otherwise brilliant and solid opinion was in error, even if it was intended as a strategic maneuver. All Americans have a fundamental right to marry. *Loving v. Virginia*, 388 U.S. 1, 12 (1961); *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978). That fundamental right to marry includes a right to choose one's partner in life. *E.g.*, *Perez v. Lippold*, 198 P.2d 17, 19 (Cal. 1948) ("[T]he right to marry is the right to join in marriage with the person of one's choice."). Since gay and non-gay people share the same rights, *see Bowers v. Hardwick*, 478 U.S. 186, 218-19 (1986) (Stevens, J., dissenting), gay people have the same right to marry as non-gay people. In Justice Stevens' words:

[E]very free citizen has the same interest in 'liberty' that the members of the majority share. From the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions.

Id. Thus, the fundamental right in question is not a "right to same-sex marriage," *Baehr*, 852 P.2d at 56, but rather a right to choose one's partner in marriage free of arbitrary interference, such as same-race or different-sex restrictions imposed by the state. That choice is protected not just by the guarantee of equal protection identified by the *Baehr* court, but also by the right to privacy (i.e., the free individual's right to make important decisions and shape her own life), the freedom of intimate association, and the fundamental right to marry itself. As the *Baehr* court itself acknowledged in its May 1993 ruling, there is nothing intrinsically heterosexual about the values, aspirations, or fundamental institutional nature of marriage.

To date, the *Baehr* court appears to have split the difference, hewing closely and cautiously (if unnecessarily) to the United States Supreme Court's recent cramped interpretation of the federal right to privacy, *Baehr*, 852 P.2d at 57, while at the same time resting its correct outcome on the secure foundation of the equal protection provisions of the Hawaii Constitution. Justice Levinson both reached the right result, and was cautious in doing so. *See supra* text accompanying notes 27-30. Still, ultimately, I believe that the very sex discrimination contained in the different-sex restriction and condemned by the court under the equal protection provisions also runs afoul of the substantive rights to marry, to privacy, and to choose one's intimate associates.

31. *Baehr*, 852 P.2d at 60.

32. *See Hardwick*, 478 U.S. at 194 ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable

As we urged in our briefs, the court relied heavily on the 1967 case of *Loving v. Virginia*.³³ In *Loving*, a black woman and a white man were convicted for violating Virginia's miscegenation law, which imposed a same-race restriction on marriage.³⁴ Exiling the Lovings from their home state for twenty-five years and declaring their marriage not just illegal, but definitionally "void," the trial judge stated:

Almighty God created the races white, black, yellow, malay, and red, and he placed them on separate continents The fact that he separated the races shows that he did not intend for the races to mix.³⁵

In *Loving*, the U.S. Supreme Court rejected this parochial moralizing in the guise of reasoning;³⁶ in *Baehr*, the Hawaii Supreme Court rejected the

roots in the language or design of the Constitution."). Justice White's disingenuous, distorted, and tendentious formulation in *Hardwick*—part of his campaign against the privacy doctrine embodied, of course, in *Roe v. Wade*, 410 U.S. 113 (1973)—has been widely criticized. See Evan Wolfson, *Civil Rights, Human Rights, Gay Rights: Minorities and the Humanity of the Different*, 14 HARV. J.L. & PUB. POL'Y 21, 35 n.59 (1991). Indeed, "[c]ommentators have been virtually unanimous in their criticism of *Hardwick's* reading of the Court's privacy jurisprudence." *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1523 n.30 (1989). Justice Lewis Powell, who contributed the swing vote that gave Justice White his 5-4 majority in *Hardwick*, has since conceded that, in retrospect, he "probably made a mistake," and that "the dissent had the better of the arguments." Wolfson, *supra*, at 36 n.59. Nevertheless, in today's right to privacy cases, the aura of contestedness remains. Having an alternative route to the right result, the *Baehr* court chose, for now at least, to avoid the privacy path.

33. *Baehr*, 852 P.2d at 60-63 (citing *Loving v. Virginia*, 388 U.S. 1 (1961)).

34. The same-race restriction on marital choice struck down in *Loving* was a "measure[] designed to maintain White Supremacy," *id.* at 11, much as the "different-sex restriction" challenged in *Baehr* serves only to promote heterosexism and to perpetuate the historical subordination of women. See Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994) [hereinafter Koppelman, *Why Discrimination*]. See also Andrew Koppelman, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988) [hereinafter Koppelman, *The Miscegenation Analogy*]; Mark Strasser, *Family, Definitions, and the Constitution: On the Antimiscegenation Analogy*, 25 SUFFOLK U. L. REV. 981 (1991). Neither of these, needless to say, is a legitimate state objective in a constitutional scheme that values individual choice and the diversity that results. See *Hardwick*, 478 U.S. at 204-06 (Blackmun, J., dissenting).

35. *Loving*, 388 U.S. at 3. The lower court ruling, upheld by the Virginia Supreme Court, is permeated by assertions that marriage *by definition* contains a same-race restriction; the court therefore treated the restriction as simply inherent in the nature of things. This is much how the different-sex restriction on marriage is characterized today, while people forget how intensely the same arguments were made just a few decades ago. See, e.g., *Scott v. Georgia*, 39 Ga. 321, 323 (1869) (claiming racial intermarriage is "unnatural," and would lead to children who are "generally sickly, and effeminate . . . and inferior in physical development and strength"). See also Hunter, *supra* note 11, at 13-15. For a cautionary example of how quickly people can be led to forget even their recent past, see GEORGE CHAUNCEY, *GAY NEW YORK* (1994) (documenting how the anti-gay repression from the 1930s to the 1960s effaced gay institutions and even the memory of the relative openness of the early 20th century).

36. *Loving*, 388 U.S. at 11 ("There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies [a racial] classification.").

"tautological and circular nature"³⁷ of the State's argument that same-sex couples cannot marry because marriage is inherently for different-sex couples.

Like the *Loving* Court the *Baehr* court required the state either to come up with compelling reasons, backed by evidence, or to stop discriminating.³⁸ Unlike the courts hearing same-sex couples' marriage cases twenty years ago, the Hawaii Supreme Court refused to accept the usual anti-gay "tortured and conclusory sophistry."³⁹ Now the State will have to prove in the trial court that denial of marriage licenses to same-sex couples is necessary to achieve its asserted legitimate ends and is "narrowly drawn to avoid unnecessary abridgements of constitutional rights."⁴⁰ For once, the arguments against gay equality in marriage will be subjected to real, indeed, *strict* scrutiny.

B. *The State's Attempts to Defend the Different-Sex Restriction*

So far, attorneys representing the State have tentatively proffered the following interests to justify Hawaii's restriction on marriage:⁴¹ "[There is a] compelling State interest in fostering procreation;"⁴² "a child is best

37. *Baehr v. Lewin*, 852 P.2d 44, 63, *clarified on grant of reconsideration in part*, 852 P.2d 74 (Haw. 1993).

38. *See id.* at 68.

39. *Id.* at 63. *Compare Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973) (reasoning that a same-sex couple must be denied a license to marry because they are incapable of marriage as the term is defined). *See Mohr, supra* note 11, at 304-07.

40. *Baehr*, 852 P.2d at 68.

41. *See* Defendant's Response to Plaintiffs' First Request for Answers to Interrogatories, Dec. 17, 1993, at 6-10 (on file with Lambda) [hereinafter Defendant's Response]. As stated earlier, in this article I will not refute at length the non-gay (or anti-gay) arguments made by the State's attorneys, reserving that for our briefs in the months ahead. I note again, however, that it is uncanny how the arguments made to defend the different-sex restriction echo those offered to defend the same-race restriction at issue in the miscegenation cases, *see Hardwick*, 478 U.S. at 210 n.5 (Blackmun, J., dissenting), and appalling to see such illogical and offensive arguments made with a straight face (as it were). As one commentator wrote in 1992:

Only 25 years ago and it was a crime for a black woman to marry a white man. Perhaps 25 years from now we will find it just as incredible that two people of the same sex were not entitled to legally commit themselves to one another. Love and commitment are rare enough; it seems absurd to thwart them in any guise.

Quindlen, *supra* note 5, at A23.

42. Defendant's Response, *supra* note 41, at 6. *But see* Tom C. Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 LOY. L.A. L. REV. 1, 9 (1969) (quoting a former Supreme Court Justice observing that "[p]rocreation is certainly no longer a legitimate or compelling State interest in these days of burgeoning populations."). Even if the State's claim were true, it does not, and cannot, make any showing that discriminating in the issuance of marriage licenses furthers, let alone is narrowly tailored to, the promotion of procreation. The fit is both under- and over-inclusive. Many non-gay people marry without procreating, without intent to procreate, and even without the ability to procreate; they are nonetheless married. Marriage licenses, after all, are not issued with a "sunset provision" whereby you have two years to produce a child or your marriage expires. On the other hand, many lesbians and gay men *do* parent, and wish to raise their children within the kind of structure that marriage offers. Moreover, preventing one group of people from marrying

parented by its biological parents living in a single household;"⁴³ "same[-]sex couples cannot, as between them, conceive children;"⁴⁴ "allowing same[-]sex couples to marry conveys in socially, psychologically, and otherwise important ways approval of non-heterosexual orientations and behaviors;"⁴⁵ "all Hawaii marriages [would become] unenforceable in one or

the partners of their choice does nothing to encourage or facilitate procreation by another group of people. Presumably non-gay men and women will continue to procreate and marry, even once lesbians and gay men are treated equally in our right to love and marry.

43. Defendant's Response, *supra* note 41 at 6. This proposition is both offensive and unproven. Today we recognize that "[w]hatever the content of American fantasies surrounding the nuclear family, decreasing numbers of Americans actually live in them." Alissa Friedman, *The Necessity for State Recognition of Same-Sex Marriage: Constitutional Requirements and Evolving Notions of Family*, 3 BERKELEY WOMEN'S L.J. 134, 135 (1988); *Only One U.S. Family in Four is "Traditional,"* N.Y. TIMES, Jan. 30, 1991, at A19. Children raised in families that differ from the model that the State—with no evidence—asserts to be the best, grow up healthy, happy, and entitled to equal respect. See *Bottoms v. Bottoms*, 444 S.E.2d 276, 283 (Va. Ct. App. 1994) (holding that homosexuality does not per se render a parent unfit for custody). Moreover, even were it somehow true that one form of family were the best, the appropriate remedy cannot be to deprive the children of other parents (nonbiological, single, divorced, or gay) of the benefits, opportunities, and meaning that their parents may seek in marriage.

44. Defendant's Response, *supra* note 41, at 7-8. This is simply untrue. Gay men and lesbians do parent children, and usually seek to raise them together with the partners of their choice, just like non-gay people. See, e.g., *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993) (granting second-parent adoption to a lesbian couple); *Adoptions of B.L.V.D. and E.L.V.B.*, 628 A.2d 1271 (Vt. 1993) (same). The number of children raised in households with gay or lesbian parents ranges from six million to fourteen million. Frederick W. Bozett, *Children of Gay Fathers*, in GAY AND LESBIAN PARENTS 39 (Frederick W. Bozett ed., 1987); JOY SCHULENBERG, GAY PARENTING (1985) (reporting 6 million children living in gay households); ABA Annual Meeting Provides Forum for Family Law Experts, 13 FAM. L. REP. (BNA) No. 41 at 1513 (1987) (reporting 8 to 10 million children living in gay households). Moreover, "[t]here is no evidence that children who are raised with a loving couple of the same sex are any more disturbed, unhealthy, or maladjusted than children raised by a loving couple of mixed sex." *Bottoms*, 444 S.E.2d at 283 (quoting *Bezio v. Patenaude*, 410 N.E.2d 1207, 1215-16 (Mass. 1980); *In re Evan*, 583 N.Y.S.2d 997, 1002 n.1 (Surr. Ct. N.Y. 1992); see also Saralie Benovich Pennington, *Children of Lesbian Mothers*, in GAY AND LESBIAN PARENTS 34.

Perhaps most important, the Hawaii Supreme Court identified the denial of child custody and support payments as one of the harms that the deprivation of equal marriage rights inflicts on lesbians and gay men. It thereby has already recognized gay partners' procreation- and parenting-related interests. *Baehr v. Lewin*, 852 P.2d 44, 59, *clarified on grant of reconsideration in part*, 852 P.2d 74 (Haw. 1993).

45. Defendant's Response, *supra* note 41, at 7. This pernicious asserted State interest is neither "compelling" nor legitimate. It is not for the State to approve or disapprove of "non-heterosexual orientations and behaviors;" indeed, under our constitutional scheme, the State has no business dictating an orthodoxy or ideology of superiority or subordination, whether in creed, religion, sexual orientation, gender, or race. See, e.g., *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("[N]o official, high or petty, can prescribe what shall be orthodox."); see also *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."). The State has even less business enforcing its approval by stigmatizing a particular group or class, branding its members second-class citizens, or denying their right to marry and participate equally in society. See *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (holding that government's "bare . . . desire to harm a politically unpopular group" is constitutionally illegitimate); *Coates v. Cincinnati*, 402 U.S. 611, 615 (1971) ("[M]ere public

more other jurisdictions;"⁴⁶ "same-sex couples will have disproportionate incentives to move to and/or remain in Hawaii," costing money and "distort[ing] the job and housing markets;"⁴⁷ "[it] will alter the state of Hawaii's desirability as a visitor destination."⁴⁸

Further, after more than a year of ferment and debate in response to *Baehr*, the state legislature labored to produce its own "compelling" interest for continued discrimination. What it came up with as its sole identified justification was the aforementioned "procreation" cluster of arguments.⁴⁹

intolerance or animosity cannot be the basis for abridgment" of constitutional rights such as association.).

46. Defendant's Response, *supra* note 41, at 8. Although a comprehensive examination of the constitutional and federalist obligation of other states to recognize marriages validly contracted in Hawaii is beyond the scope of this article, *see infra* note 196 and accompanying text, this particular assertion by the State is absurd. As a legal matter, the issue of recognition will arise when a particular individual or couple presents a claim. It will not arise from some abstract, across-the-board "declaration of war" on the marriages of Hawaii in a hostile "states-rights" gesture from mainland legislatures. Even if some states were to seek to resist recognition of, or respect for, same-sex couples' marriages, there is no constitutional provision, common law doctrine, or precedent to serve as a basis for a wholesale rejection of all Hawaii marriages.

47. Defendant's Response, *supra* note 41, at 9. The State, of course, cannot adduce a compelling interest from an asserted economic dislocation; individual rights may not be sacrificed in a discriminatory fashion solely for the financial benefit of others. *See Memorial Hospital v. Maricopa County*, 415 U.S. 250, 263 (1974) ("[A] State may not protect the public fisc by drawing an invidious distinction between classes of its citizens."); *see also Shapiro v. Thompson*, 394 U.S. 618, 627 (1969) (holding that a one-year residency requirement for receiving welfare benefits is "invidious discrimination"); *Plyler v. Doe*, 457 U.S. 202, 215 (1982) (holding that illegal aliens are entitled to equal protection). Moreover, the state's economic claim is unfounded. The better argument—and the only evidence brought forth so far—is that eliminating discrimination will entail economic benefits for the state and the community, as well as the individuals directly concerned. *See, e.g., Jennifer Gerarda Brown, Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. (forthcoming Mar. 1995).

48. Defendant's Response, *supra* note 41, at 6-10.

49. In response to the *Baehr* decision, the state legislature passed a law reiterating its desire to perpetuate the different-sex restriction on marriage. 1994 HAW. SESS. LAWS 217. The law berates the Hawaii Supreme Court for its ruling, and, indeed, for presuming to rule at all on the lawfulness of discriminatorily withholding marriage from same-sex couples, which the legislature characterized as a matter of "policy . . . inappropriate for judicial response." *Id.* at § 1.

The law is most remarkable, however, for what it does not do—demonstrate a truly compelling state interest for discriminating. The sole justification the legislature asserts is the claim that "Hawaii's marriage licensing statutes, as originally enacted, were intended to foster and protect the propagation of the human race through male-female marriages." *Id.* As the *Baehr* court already noted, 852 P.2d at 49, whatever else can be said about this dubious assertion, *see text surrounding notes 41-53*, it is inconsistent with the legislature's own previous actions deleting a requirement that "marriage applicants show that they are not impotent or physically incapable of entering into a marriage." 1994 HAW. SESS. LAWS 217, § 1.

Ultimately, of course, all these arguments must fail: in America today, marriage is not a mere dynastic or property arrangement; it is not best understood as a tool or creature of the state or church;⁵⁰ and it is not simply, primarily, or necessarily about parenting, let alone procreation. Whatever the history, today marriage is first and foremost about a loving union between two people who enter into a relationship of emotional and financial commitment and interdependence, two people who seek to make a public statement about their relationship, sanctioned by the state, the community at large, and, for some, their religious community.⁵¹ And that concept of marriage, no more and no less, should hold for gay people seeking to marry.

It should be well settled in our modern, secular America that the decision whether to bear or raise children belongs to the individual and to the couple alone, and that marriage rights cannot be subjected to professed state policies on procreation.⁵² As the U.S. Supreme Court wrote decades ago, decoupling marriage from procreation:

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. *It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.*⁵³

Marriage is an association in which, for deep personal and social reasons, lesbians and gay men seek the equal right to partake.

Given the "interests" it has presented for excluding us, claims that are hardly "compelling," the State is unlikely to prevail on remand. The different-sex restriction challenged in *Baehr* will go the way of the same-race

50. Of course, our litigation in *Baehr* involves the denial of a marriage license by the State, and has nothing to do with private religious doctrines or ceremonies. Each religion remains free to grant or withhold its sanction to same-sex unions, wholly independently of a civil marriage. Parenthetically, there is little clamor from Catholic, Protestant, Jewish, or other religious denominations when licenses are granted for marriages performed by other faiths, even though they may not recognize such marriages as consonant with the doctrines of their respective religions; there, the line between civil and religious marriage is understood and respected.

51. See 1 HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 74 (2d ed. 1987) (The American institution of marriage has changed "from the days when it was an economic producing unit of society with responsibilities for child rearing and training, to the present, when its chief functions seem to be furnishing opportunities for affection, companionship, and sexual satisfaction.").

52. See, e.g., *Carey v. Population Services Int'l*, 431 U.S. 678, 693 (1977) (holding that forbidding the sale of non-prescription contraceptives to minors is not a compelling state interest); *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (finding unconstitutional a statute prohibiting distribution of contraceptives to unmarried people); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (holding that the use of contraception is a privacy right of married couples).

53. *Griswold*, 381 U.S. at 486 (emphasis added).

restriction challenged in *Loving*: discarded as an unconscionable intrusion on people's right to love and marry.

C. *The Meaning of Baehr v. Lewin*

The *Baehr* decision, then, although imperfect,⁵⁴ is remarkable. Inclusion at the level of marriage is uniquely revolutionary, conservatively subversive, singularly faithful to true American and family values in a way that few, if any, other gay and lesbian victories would be. This is true not only because of marriage's central symbolic importance in our society and culture, but also because of what the court called the "encyclopedic" multiplicity of rights and benefits that are contingent upon that status.⁵⁵

The reasoning of the decision itself shows the transformative potential of fighting for our equal right to marry. The court grasped what many even in our own community have not: the fundamental issues in these cases are choice and equality,⁵⁶ not the pros and cons of a way of life, or even the "right" choice.

Lambda and my co-counsel Daniel R. Foley argued what many lesbians and gay men feel: marriages between two men or two women can fulfill the same mix of interests as marriages between a man and a woman—a public affirmation of emotional and financial commitment and interdependence, access to legal and economic benefits and protections, a structure in which to raise children together, support for a relationship important to the individuals involved as well as to society, and a celebration of individuals'

54. See *supra* note 30 and accompanying text.

55. The court wrote:

The applicant couples correctly contend that the [State's] refusal to allow them to marry on the basis that they are members of the same sex deprives them of access to a multiplicity of rights and benefits that are contingent upon that status. Although it is unnecessary in this opinion to engage in an encyclopedic recitation of all of them, a number of the most salient marital rights and benefits are worthy of note. They include: (1) a variety of state income tax advantages, including deductions, credits, rates, exemptions, and estimates; (2) public assistance; (3) control, division, acquisition, and disposition of community property; (4) rights relating to dower, curtesy, and inheritance; (5) rights to notice, protection, benefits, and inheritance under the Uniform Probate Code; (6) award of child custody and support payments in divorce proceedings; (7) the right to spousal support; (8) the right to enter into premarital agreements; (9) the right to change of name; (10) the right to file a nonsupport action; (11) post-divorce rights relating to support and property division; (12) the benefit of the spousal privilege and confidential marital communications; (13) the benefit of the exemption of real property from attachment or execution; and (14) the right to bring a wrongful death action.

Baehr v. Lewin, 852 P.2d 44, 59, *clarified on grant of reconsideration in part*, 852 P.2d 74 (Haw. 1993) (internal citations omitted); see also Duclos, *supra* note 11, at 52-54 (listing benefits); Craig A. Bowman & Blake M. Cornish, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164, 1167-68 (1992).

56. *Baehr*, 852 P.2d at 60.

religious beliefs.⁵⁷ But equally important, many feel that the government should not tell people what they can and cannot do based on their sex or their sexual orientation. Brilliantly sidestepping the legal thicket of sexual orientation politics, the court's opinion cut to the core of most anti-gay discrimination—not just heterosexism, but sexism.⁵⁸

Since the decision there has been political fallout. This country's well-funded, reactionary, radical right does not just roll over.⁵⁹ We must prepare for the battles that will follow an ultimate victory in the Hawaii Supreme Court, lest the "State's Rights" crowd once again attempt to gut or evade the constitutional precept that an American's fundamental rights remain with her wherever in the country she may travel or live. We must also keep the entire range of lesbian and gay concerns at the forefront; as with the fight for the right to serve openly in the military, inclusion need not mean co-optation.

But while fighting and preparing, we should take a moment to savor this seismic win and the enlarged possibilities it brings to us as individuals, as lovers, as gay people, and as Americans. The Supreme Court decision in *Baehr* shifted the very ground underlying gay people's second-class status, and one of the, if not the major, barriers to our full and equal citizenship has cracked wide open. If choice, inclusion, and love are the true foundations of gay people's pursuit of happiness, then with this victory out of Hawaii, the earth moved.

II

RESPONDING TO THE INTRA-COMMUNITY CRITIQUE

Let me not to the marriage of true minds
Admit impediments.⁶⁰

57. In *Turner v. Safley*, 482 U.S. 78, 95-96 (1987), the Supreme Court upheld prisoners' fundamental right to marry, notwithstanding "the limitations imposed by prisoner life," because of these "important attributes of marriage:"

First, inmate marriages, like others, are expressions of emotional support and public commitment. . . . In addition, many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication. Third, . . . most inmate marriages are formed in the expectation that they ultimately will be fully consummated. Finally, marital status is often a precondition to the receipt of government benefits . . . , property rights . . . , and other, less tangible benefits. . . . [T]hese incidents of marriage, like the religious and personal aspects of the marriage commitment, are unaffected by the fact of confinement. . . .

58. See *infra* text accompanying notes 133-35.

59. See Susan Miller, *Reason to Celebrate: An Interview With Dan Foley, Esq.*, ISLAND LIFESTYLE, June 1994, at 34 (describing political and legislative response to *Baehr* in Hawaii).

60. WILLIAM SHAKESPEARE, *Sonnet 116*, in SHAKESPEARE'S SONNETS 269 (W.G. Ingram ed., Hoddard and Stoughton Educational 1978) (1609).

Of course, some lesbians and gay men have a different opinion about the desirability of fighting for gay marriage rights. In her article, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"*⁶¹ Polikoff argues that gay people should not demand equal marriage rights for three asserted reasons: (1) marriage is an "inherently problematic institution" that gay people should not seek to join;⁶² (2) gay people will betray themselves by the rhetorical and ideological compromises that they will be forced to adopt through their effort to win equal marriage rights;⁶³ and (3) working for and winning the right to marry may thwart a fairer distribution of social goods such as health care and other necessities.⁶⁴ I disagree with each of these assertions and with their underlying premises.

A. *The Critique that Marriage is an "Inherently Problematic" Institution*

In an argument typical of many intra-community critics of marriage challenges, Polikoff contends: "[T]he desire to marry in the lesbian and gay community is an attempt to mimic the worst of mainstream society, an effort to fit into an inherently problematic institution that betrays the promise of both lesbian and gay liberation and radical feminism."⁶⁵

There are at least two disturbing premises embedded in this argument.

1. *The Desire of Gay People to Attain the Equal Right to Marry*

First, why is a lesbian's aspiration to marry "an attempt to mimic," rather than a genuine expression of her desires? Professor Mary C. Dunlap quotes one lesbian's observation:

[I]t was strange to me when people in our community talked about commitment ceremonies as mocking heterosexual experience, because for me the creation of our Brit Ahavah [Jewish wedding ritual] was so different from a heterosexual wedding. The fact that gays and lesbians do this against all odds makes the whole process completely different.⁶⁶

Nor is this woman's desire to get married unusual.⁶⁷ In the words of one gay man, "if it is freely chosen, a marriage license is as fine an option as

61. Polikoff, *supra* note 11.

62. *Id.* at 1536.

63. *Id.* at 1541-50.

64. *Id.* at 1549.

65. *Id.* at 1536.

66. Dunlap, *supra* note 11, at 81 n.47 (quoting Rosanne Leipzig & Judy Mable, *Tikkun Olam—Healing of the World*, in CEREMONIES OF THE HEART: CELEBRATING LESBIAN UNIONS 298 (Becky Butler ed., 1990)).

67. The marriage-litigation plaintiffs I have worked with, Ninia Baehr and Genora Dancel, Pat Lagon and Joe Melillo, Craig Dean and Patrick Gill, and others, all speak from the heart (and from years of togetherness) of their love and desire to make a public commitment to share their lives. See, e.g., Beth Harrison, *We're Going to the Chapel*, THE FRONT

sexual license. All I ask is the right to choose for myself, but that is exactly the right that society has never granted. . . ."⁶⁸ One historian generalizes that "[g]ays and lesbians are raised in the same culture as everyone else. When they settle down they want gold bands, they want legal documents, they want kids."⁶⁹ Even though equal marriage rights, until recently, seemed a dream, all available evidence suggests that the vast majority of gay and non-gay people alike share such sentiments.

In a 1994 survey by *The Advocate*, the largest existing poll of gay men on the subject, nearly two-thirds of the respondents stated unequivocally that they would marry a man if they were legally able to; 85 percent responded "yes" or "maybe;" only 15 percent said they would not marry.⁷⁰ A significantly smaller, earlier poll by another journal presented similar results: 83 percent of lesbians and gay men in the study said they would "definitely" get married if they could.⁷¹

PAGE, NOV. 25, 1994, at 3 (interview with marriage plaintiffs, describing how they met and fell in love and why they want to get married); Kimberley Griffin, *To Have and To Hold: Gay Marriage, The Next Frontier*, WINDY CITY TIMES, June 2, 1994, at 1; Kristen Cook, *Traditional Church Wedding Will Unite Grooms Only*, ARIZ. DAILY STAR, Sept. 10, 1993, at B1; Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 552-53 (1992); Barbara J. Cox, *Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home*, 1994 WIS. L. REV. 1033 n.12.

68. Arnie Kantrowitz, *Till Death Do Us Part: Reflections On Community*, ADVOC., Mar. 1983, at 27. Kantrowitz concludes:

[T]he right to choose marriage still remains the ultimate normalization of relations between nongay and gay society. It extends the impact of gay anti-discrimination laws because it not only recognizes the right to be different, it recognizes the right to be equal. It acknowledges not only gay pain, but gay pride and pleasure. It says that our friends not only pity us, they respect us and believe our love is as real as their own. But they do not.

Id. at 27. As I wrote in law school eons ago when I first read these words, it is time to lift that sentence off the heads of gay women and men in America.

69. Eloise Salholz, *For Better or For Worse*, NEWSWEEK, May 24, 1993, at 69 (quoting Eric Marcus). Gay people, for the most part, grow up among the non-gays in our shared popular culture (my preferred, if stereotypical, slice of which is represented by the quoted romantic show tunes).

70. "Question 48 - If marriage to a man were legal in the United States, would you want to marry a man someday?" Yes (58.9%); Maybe (26.1%); No, but I do want a lifelong relationship (12.1%); No, and I do not want a lifelong relationship (2.8%). Janet Lever, *Sexual Revelations*, ADVOC., Aug. 1994, at 17, 24 (results on file with author). The survey distinguished clearly between marriage and a nonmarital lifelong relationship. Still, only 15 percent of gay men polled said they do not want marriage. The *Advocate* will conduct a similar survey of lesbians later this year.

71. *Readers Favor Legal Marriage*, PARTNERS MAGAZINE FOR GAY & LESBIAN COUPLES, July/August 1990. In one recent *Newsweek* poll, lesbians tended to rank equal marriage rights a far higher priority than the gay men surveyed. *Newsweek* Poll, *Most Gays Believe President Clinton is not Taking Gay Issues Seriously Enough*, at 7-8 (on file with Lambda). Asked to evaluate the importance of several goals for gay people, only 7 percent of the lesbians responding said equal marriage rights were "not too important," compared to 19 percent of the gay men. *Id.* Sixty percent of lesbians surveyed said equal marriage rights were "very important," an answer selected by 39 percent of the gay men. *Id.* While no one poll or set of polls under present circumstances provides a dispositive answer to the

Like non-gay people, many lesbians and gay men offer less romantic explanations of their desire for equal marriage rights. For instance, noting the difficulties that gay people experience in terminating relationships and securing legal assistance, one attorney remarks: "I used to say, 'Why do we want to get married? It doesn't work for straight people.' . . . But now I say we should care: They have the privilege of divorce and we don't. We're left out there to twirl around in pain."⁷² Many emphasize the social value in ending the denial of marriage to gay couples:

[T]he current frontier justice that obtains when gay couples part will eventually be replaced by a more civilized standard as more states and municipalities recognize gay couples as a legal unit. . . . Some lawyers contend that the complexities of gay divorce will eventually prove the strongest argument yet for gay marriages, since it would establish the right to a fair process when those relationships fall apart.⁷³

Gay people share the same mix as non-gay men and women of practical and emotional, social and individual reasons for wanting the right to marry.

For several years now, Lambda's intake has reflected a constant, high level of interest in marriage within our communities. During the 1987 March on Washington, thousands of lesbians and gay men participated in an event pointedly billed "The Wedding," in which they celebrated their relationships by exchanging personal vows before an officiant in front of the Internal Revenue Service Building.⁷⁴ In his travels across the United States⁷⁵ and again around the world,⁷⁶ Neil Miller chronicled gay person after person either seeking marriage or indeed, as far as possible, actually wedding their partners.

Consider, for example, the experience of one couple that Miller encountered:

somewhat misleading question, "what do gay people want?," it is clear that there is enormous desire for equal marriage rights, just as there is among non-gay people.

72. See Kirk Johnson, *Gay Divorce: Few Markers in This Realm*, N.Y. TIMES, Aug. 12, 1994, at A20 ("Because gay people cannot be legally married in the United States, there is, for starters, no access to divorce court.").

73. *Id.*

74. Linda Wheeler, *2000 Gay Couples Exchange Vows in Ceremony of Rights*, WASH. POST, Oct. 11, 1987, at B1. This gathering took place years before equal marriage rights seemed within reach.

75. NEIL I. MILLER, *IN SEARCH OF GAY AMERICA* 28 (1989) (Gene and Larry, Oklahoma City, OK); *id.* at 96 (Sandy and Sue, Bismarck, ND); *id.* at 103-04 (Craig and Jonathan, Rapid City, SD); *id.* at 159 (Trinity and Desiree, San Francisco, CA); *id.* at 162-63 (Dana and Prudence, San Francisco, CA).

76. NEIL I. MILLER, *OUT IN THE WORLD: GAY AND LESBIAN LIFE FROM BUENOS AIRES TO BANGKOK* 363 (1992) (Lesbian and gay marriages "seemed to capture the imagination of gay people, from the black townships of South Africa, where a gay community was just emerging, to countries such as Denmark, where there had been a strong gay movement for years.").

Des was reluctant. She didn't believe in marriage and was opposed to imitating what she viewed as the heterosexual model. "I had a women's studies point of view," she noted. But gradually Trinity convinced her that marriage simply represented an expression of love and commitment that was neither intrinsically heterosexual or homosexual.⁷⁷

While Desiree is certainly entitled to her original as well as her subsequent views, so is Trinity. Desiree's original critique—her "women's studies point of view"—may also have been quite accurate. But ultimately, the view she came to share with Trinity seems more empowering, for she and Trinity made marriage what they wanted it to be—not by flailing at it, not by fleeing it, but instead by claiming it.

The suggestion that lesbians and gay men who want equal marriage rights do not know what is best for them as gay people is not uncommon in the intra-community arguments against pursuing marriage. In the charge that the demand for equal marriage rights is insufficiently radical or liberationist, a contemptable desire to "mimic" or "emulate" the non-gay world, or a sell-out of less "assimilationist" or less "privileged" gay people,⁷⁸ there is an inescapable whiff of imputed false consciousness.⁷⁹ However, given the diversity and number of women and men within our communities who strongly want the equal right to marry, the imputation seems wrong, as well as unfair.

Indeed, Polikoff and others of us in the movement repeatedly declare our deep commitment to the values of diversity and choice. These values are essential elements of "the promise of both lesbian and gay liberation and radical feminism" that Polikoff invokes.⁸⁰ A good-faith commitment to diversity and choice must include the acknowledgement that not all gay people (to say the least) consider marriage—especially their own desired marriages—as innately problematic.

77. *Id.* at 159.

78. See *infra* text accompanying notes 160-63.

79. Polikoff's reductionist claim that gay people's "desire to marry . . . is [just] an attempt to mimic the worse of mainstream society," Polikoff, *supra* note 11, at 1536, is hardly unique. For example, while acknowledging the force of some arguments made against hinging legitimacy and benefits on institutions such as marriage, Professor Dunlap has criticized one of Polikoff's epigoni for her "gross stereotyping of subgroup motivations and ambitions" in automatically attributing anti-marriage views to those whom she labeled "more marginal members of the lesbian and gay community (women, people of color, working class[,] and poor)." Dunlap, *supra* note 11, at 78; see also Eskridge, *supra* note 11, at 1491-93.

80. Polikoff, *supra* note 11, at 1536.

We lesbians and gay men are "a remarkably diverse group;"⁸¹ we are, as we say, everywhere. Many of us, perhaps even most of us, are not always visible, even to those lesbians and gay men who are the most visible. Unlike the members of most other minority groups, we are not born into our identity or our community; we have to find our way there largely on our own, after working through negative socialization from family and other institutions that most others rely on for self-identification, solidarity, and support. We have to understand and even construct our lesbian or gay identity around complex issues that American society handles singularly poorly: sex, intimacy, gender roles, and same-sex attraction. Our community (or communities) is shaped by these facts, as well as by the corollary notion that most gay people can "pass" and thus need not partake in gay identity on an all-or-nothing basis. Accordingly, "assimilationist" or not, many of us do not identify or live our lives as gay in precisely the ways and terms that others of us would choose, or even deem gay or lesbian.⁸² Ironically, despite this fact, when it comes to the marriage issue, the gay community—men *and* women—has been far ahead of the "leaders," the organizations, and most of us in what passes our movement's chattering classes.⁸³ They have made the personal, political; they know what they want, and it includes equal marriage rights.

81. ALAN P. BELL & MARTIN S. WEINBERG, *HOMOSEXUALITIES* 217 (1978); *see also* C.A. TRIPP, *THE HOMOSEXUAL MATRIX* 119 (1987) (The lesbian and gay community consists of "individuals who are about as diffusely allied with each other as the world's smokers or coffee-drinkers, and who are defined more by social opinion than by any fundamental consistency among themselves."). While I obviously believe we can meaningfully speak of "the gay community," there are ways in which it is also accurate to see us as "communities" or even (I hope at least) a "coalition." *See* Bernice J. Reagon, *Coalition Politics: Turning the Century*, in *HOME GIRLS: A BLACK FEMINIST ANTHOLOGY* 356, 359-62 (Barbara Smith ed., 1983) (defining "coalition" as an association of diverse people grouped together or who join together for what they have in common, not to create uniformity).

82. Polikoff has written before of her frustration over this fact. *See* Nancy D. Polikoff, *Lesbian Mothers, Lesbian Families: Legal Obstacles, Legal Challenges*, 14 N.Y.U. REV. L. & SOC. CHANGE 907, 908-09 (1986) (describing, for example, her "horrified" reaction to findings about the "sex-role behaviors and attitudes toward ideal child behavior" of some of her "lesbian sisters" and her efforts to urge "lesbian mothers not to see themselves as having more in common with heterosexual mothers than they have with lesbians who have no children"). I myself write as a gay man who has chosen to be totally "out" virtually all the time, believing that gay identity in a heterosexist society has a political dimension (and is also more true to myself; fortunately it works for me). But I also believe there is more than one right way to be gay or lesbian. For a different, radical version of this seemingly unradical proposition, *see*, for example, Adrienne C. Rich, *Compulsory Heterosexuality and Lesbian Existence*, in *POWERS OF DESIRE: THE POLITICS OF SEXUALITY* 177, 192 (Ann Snitow, Christine Stansell & Sharon Thompson eds., 1983) (describing a "lesbian continuum" whereby behavior, identity, and choices of women may be understood as lesbian regardless of how others see them).

83. This is not exactly a novel phenomenon in civil rights movements. Martin Luther King, Jr. commented in 1963:

It was the people who moved their leaders, not the leaders who moved the people. Of course, there were generals, as there must be in every army. But the command post was in the bursting hearts of millions of Negroes. When such a people begin to move, they create their own theories, shape their own destinies, and choose the

What many gay people do not want is an all-or-nothing model imposed on their lesbian or gay identity; they want both to be gay *and* married, to be gay *and* part of the larger society.⁸⁴ For these lesbians and gay men, being gay is not just about being different, it is also about being equal. Their deeply-held convictions about how they want to live their lives and liberation are not mere mimicry. They are entitled to respect within our community as well as by the state.⁸⁵

leaders who share their own philosophy. A leader who understands this kind of mandate knows that he must be sensitive to the anger, the impatience, the frustration, the resolution that have been loosed in his people. Any leader who tries to bottle up these emotions is sure to be blown asunder in the ensuing explosion.

KING, *supra* note 15, at 144. I have already alluded to the ideological deadlock that originally sidelined national lesbian and gay groups during the major marriage challenges of the past few years. Now we scramble to assure that there is a strategy behind our efforts and to foster the requisite nitty-gritty follow-through in political organizing and public education that must accompany legal activism. See *infra* part III.

84. See, e.g., *Shahar v. Bowers*, 836 F. Supp. 859 (N.D. Ga. 1993). In *Shahar* a lesbian sought protection for both her marriage to another woman (performed by a rabbi) and her government job. The lower court permitted Georgia Attorney General Michael Bowers to withdraw an offer of government employment from attorney Robin Joy Brown because she and her female partner, Francine M. Greenfield, had held a religious wedding ceremony, and had adopted the shared last name Shahar. *Id.* at 864-65. The court declared that although Shahar's relationship was constitutionally protected, it could be invoked by the State as grounds for denying her a job. *Id.* Bowers supported his anti-gay and anti-gay marriage discrimination by claiming that lesbian and gay intimate relationships are not protected, citing the case that will doubtless be his most enduring monument, *Bowers v. Hardwick*. Defendant's Motion to Dismiss, *Shahar v. Bowers*, 836 F. Supp. 859 (N.D. Ga. 1993), cited in *Shahar v. Bowers*, No. 1:91-CV-2397-RCF, 1992 U.S. Dist. LEXIS 7791, at *11. See discussion *supra* note 32 and accompanying text.

Ironically, the *Hardwick* Court had ostensibly based its reasoning on the claim that "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated. . . ." *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986). Cases such as *Shahar* and *Baehr* attempt to correct that purported deficiency in the *Hardwick* record, emphatically emphasizing the connections that gay people have to family, to loving relationships, to procreation, and, yes, to marriage. See Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521, 534 (1989) (urging "substantive" answer to *Hardwick* majority that highlights similarities between same-sex and different-sex unions, with reference to marriage). This is one of the Catch-22's often imposed on gay people: our basic rights, including sexual privacy, are not protected because we are not married, but we are denied the right to marry (and are fired, as in *Shahar*, when we try to). How odd that the proud women and men who are plaintiffs in these cases, asserting their identity and equality as open and loving lesbians and gay men, should find themselves reduced to the label of "assimilationist."

85. I also believe that that same respect should be accorded others, gay and non-gay, who live their lives as unconventional, nonconforming, "queer," or separatist. See Wolfson, *supra* note 32, at 33 ("[B]eing different is part of being human, not a reduction of it, and not a justification for dehumanization or denial of rights."). That, to me, is the richness of our free society, ideally based on respect for the individual and appreciation of human difference. See, e.g., *Cohen v. California*, 403 U.S. 15, 24 (1971) (the Constitution puts "the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., joined by Holmes, J., concurring) ("[T]he final end of the state is to make [people] free to develop *their* faculties") (emphasis added), *overruled on other grounds* by *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

2. *The Historical Nature and Transformability of Marriage as an Institution*

The second premise embedded in Polikoff's argument that I dispute is the one that Trinity also challenged: the idea that the institution of marriage is in fact "*inherently problematic*" even if one were to concede that it has been *historically problematic*.⁸⁶ As Professor William N. Eskridge, Jr. notes, "marriage is not a naturally generated institution with certain essential elements."⁸⁷ In his view,

Polikoff comes perilously close to essentializing marriage as an inherently regressive institution That Western marriages have traditionally been the social instrument by which women have been subordinated does not mean that marriage "causes" that subordination. Women's subordination may be more deeply related to social attitudes about gender differences than to the formal construct of marriage per se. If that is true, same-sex marriage does not buy into a rotten institution; it only buys into an institution that is changing as women's roles and status are changing in our society.⁸⁸

Similarly, while we acknowledge the history of marriage and the institutional changes still necessary, "[t]o give actual marriage the patriarchal identity and texture of law and legal history undermines the creative and liberating actions of individuals, couples, and subcultures in society."⁸⁹ Both historically and individually, marriage is not the fixed, flawed institution that Polikoff and other critics insist it is and must be.

Adding his voice and scholarship to Eskridge's sweeping survey of the history of same-sex couples' marriages, the late Professor John Boswell has demonstrated that marriage unions and ceremonies between people of the same sex existed throughout most of Western history and that the nature and understanding of marriage itself have changed constantly in the eyes of society, religion, and the state to meet the needs and values of people at any given time.⁹⁰ For example, Boswell notes:

86. For that critique, see, e.g., Eskridge, *supra* note 11, at 1486-88. Professor Eskridge also served as co-counsel in a recent marriage challenge brought by two gay men denied a license. *Dean v. District of Columbia*, No. 90-13892 (D.C. Ct. App. Jan. 19, 1995) (court rejects claims under D.C. marriage statute, D.C. human rights law, and federal constitution, although dissenter would remand for hearing under equal protection claim).

87. Eskridge, *supra* note 11, at 1434. Eskridge continues:

[T]he social construction of marriage is dynamic. Linked as it is to other institutions and attitudes, marriage will change as they change. Conceptualized around certain practices dividing society's constituents, marriage should change as the subordinated groups identify their own oppression and decide to resist it.

Id.

88. *Id.* at 1488.

89. Dunlap, *supra* note 11, at 71.

90. JOHN BOSWELL, *SAME-SEX UNIONS IN PREMODERN EUROPE* (1994).

[I]t is difficult, perhaps impossible, to map onto the grid of premodern heterosexual relationships what modern speakers understand by "marriage": nothing in the ancient world quite corresponds to the idea of a permanent, exclusive union of social equals, freely chosen by them to fulfill both their emotional needs and imposing equal obligations of fidelity on both partners.⁹¹

Boswell's work offers lessons that both gay and non-gay people often resist: the world has not always been as we see it now, and we must enlarge our sense of possibilities to imagine (or reclaim) a society in which diverse family arrangements are respected.

Ironically, in much of her work, Polikoff is quite sensitive to the socially constructed, and thus transformable, nature of other powerful social institutions. For example, she has written cogently of the need and means to develop lesbian-conscious family law, despite the fact that the family has been a mutable and sometimes "problematic" institution, and despite the fact that the "legal system [itself] is not friendly to lesbians and gay men."⁹² Although some judges may choose not to, most of us understand that even "[t]he word 'family' in the sense of residential and biological unit is relatively new."⁹³ As an institution, the family, like marriage, has undergone radical change throughout history.⁹⁴ Polikoff's own involvement in family law activism suggests that the family's roots in a history that has included the subordination of women, class stratification, the maltreatment of children, and slavery⁹⁵—some of which continue today—hardly mean that we should not seek recognition of our family relationships. Polikoff does not

91. *Id.* at 38. Boswell documents the ambivalence of the Christian church toward marriage. He notes the often-ignored fact that marriage was only declared a sacrament or deemed to require the participation of a priest until the year 1215. *Id.* at 111. Just one of several relationships in which people might have partaken at any given moment, *id.* at 29-33, 172, the institution of marriage was often challenged and ill-defined, *id.* at xxi-xxiii, 109, 171-72, and of course changed substantially over time:

In premodern Europe marriage usually began as a property arrangement, was in its middle mostly about raising children, and ended about love. . . . By contrast, in most of the modern West, marriage *begins* about love, in its middle is still mostly about raising children (if there are children), and ends—often—about property, by which point love is absent or a distant memory.

Id. at xxi-xxii (original emphasis), 40, 48, 162, 170-71, 200, 281.

92. Polikoff, *supra* note 82, at 907.

93. FRANCES GIES & JOSEPH GIES, *MARRIAGE AND THE FAMILY IN THE MIDDLE AGES* 4 (1987) ("Before the eighteenth century no European language had a term for the mother-father-children grouping."). The Latin word *familia*, derived from a word meaning *house*, meant "the people who lived in a house, including servants and slaves." *Id.*; see also WITOLD RYBCZYNSKI, *HOME: A SHORT HISTORY OF AN IDEA* (1986) (discussing the evolution of ideas that today we take, not just for granted, but as "traditional").

94. See JOHN D'EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* (1988); see also Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187, 200.

95. E.g., GIES & GIES, *supra* note 93, at 4-37; JOHN BOSWELL, *THE KINDNESS OF STRANGERS: THE ABANDONMENT OF CHILDREN IN WESTERN EUROPE FROM LATE ANTIQUITY TO THE RENAISSANCE* (1988).

conclude that the institution's flaws are an argument against participating in the institution; rather, she calls upon us to redefine it.⁹⁶

Much of the same attack Polikoff makes about the "inherently problematic" institution of marriage she has also made about other social institutions, such as motherhood:

I have asked others to examine, as I continue to examine, how the institution of motherhood functions to maintain and promote patriarchy. I have argued that our lesbianism, by itself, does not negate or transform that institution.⁹⁷

However, in her work, so much of which is devoted to developing legal protection for lesbian mothers, Polikoff stops short of claiming that the institution of motherhood is not transformable. She does not follow her own reasoning to conclude that it is not worth demanding equal rights in parenthood.

Despite her own uncertainty regarding lesbians' and gay men's choice to marry, Professor Catharine A. MacKinnon has conceded:

I do think it might do something amazing to the entire institution of marriage to recognize the unity of two 'persons' between whom no superiority or inferiority could be presumed on the basis of gender.⁹⁸

In that vein, for example, Professor Marc A. Fajer quotes a non-gay woman who looked to lesbians as models for her own relationships. As she put it, "heterosexuals have no role models for positive, equal relationships."⁹⁹ Indeed, Boswell's research shows that same-sex romances, in marriage or otherwise, were "the predominant public ethos of eroticism in a number of times and places;" furthermore, they were often considered *ideal* relationships because they denoted equality between the partners and were based on the purer motivations of love and commitment, rather than mere procreation, patriarchy, subordination, dynastic obligations, or property arrangements.¹⁰⁰

96. Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 572 (1990) (calling on society to redefine parenthood to include anyone whom a legally recognized parent considers part of the parent-child relationship).

97. Polikoff, *supra* note 82, at 909. Of course, there have been other powerful critiques presenting motherhood as the primary institution subordinating women. See, e.g., DOROTHY DINNERSTEIN, *THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS AND HUMAN MALAISE* (1976); NANCY J. CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* (1978).

98. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 27 (1987).

99. Fajer, *supra* note 67, at 616 (quoting SUSAN E. JOHNSON, *STAYING POWER: LONG-TERM LESBIAN COUPLES* 15-16 (1990)).

100. BOSWELL, *supra* note 90, at 56-61, 74-75, 83, 136, 159-61, 280.

One need not idealize either gay relationships or marriage to conclude that gay people should have equal choices, or that there is value in the demand for equality itself. It is true that marriage is an imperfect social institution, with a long, troubled history.¹⁰¹ It is also true that marriage as a legal matter may have far less "theoretical coherence" than we like to believe.¹⁰² However, it is also true that marriage is something that we can shape and that, like any social institution, it ought to serve real people and their real needs, including our individual and familial need for equality, inclusion, and respect.

B. The Critique that Compromises in Rhetoric or Tactics Undermine Larger Goals

In addition to her belief that access to the institution of marriage itself is not a desirable goal, Polikoff is concerned that "a concerted effort to achieve the legalization of lesbian and gay marriage will valorize the current institution of marriage . . . [and] would work to persuade the heterosexual mainstream that lesbians and gay men seek to emulate heterosexual marriage as currently constituted."¹⁰³ This is bad, she argues, because we, too, will come to believe our rhetoric, become co-opted or divided, and thereby lose our liberationist vision.¹⁰⁴ Such a critique posits that social change results from the rhetorical goals and arguments a social movement adopts, is confined by the tactics it uses, and is correspondingly endangered when that rhetoric or those tactics are muted, moderated, limited, or discarded.¹⁰⁵

101. See Homer, *supra* note 11, at 520-21; see also Deborah Schupack, *Starter Marriages: So Early, So Brief*, N.Y. TIMES, July 7, 1994, at C1.

102. Homer, *supra* note 11, at 521 ("[T]he tradition of heterosexual marriage to which courts like *Baehr* refer is not so much a historical, descriptive tradition as it is an ahistorical, prescriptive ideal."). Homer is correct and insightful about the social romanticization of, and moralizing about, marriage, as well as about the murkiness of much of the legal writing and doctrine on the subject. Where he and I part company is in what to do about it.

In my view Homer, like other intra-community critics, errs in idealizing gay people's "outlaw status." *Id.* at 527-28, 530. He devalues the transformative potential of inclusion, mischaracterizes what the effort to obtain equal marriage rights is about, and presents us with false choices to support his anti-marriage position. *Id.* at 527-28. Like other critics, Homer is so focused on accentuating our "difference" that he simply undervalues the importance in itself of demanding equality, including our equal right to marry. See Maggie Tannis, *A Proposal of Marriage*, NEW ORLEANS SECOND STONE, May/June 1994, at 3 ("By not pursuing the right to marry, we are saying in effect that it is acceptable to treat gay and lesbian couples differently than heterosexual couples. That is not acceptable to me."). See also discussion, *infra*, at note 174. Finally, like other critics, Homer is selective in his intolerance of imperfection. As a fellow alumnus, I am sure he would agree with me that Harvard Law School is an institution with its share of pluses and minuses. Yet Homer elected to enter it, and presumably would agree that we should fight a ban on lesbians and gay men studying there.

103. Polikoff, *supra* note 11, at 1541.

104. *Id.*

105. A similarly wooden understanding of how social change is achieved flaws Homer's often insightful analysis of the institution and law of marriage. Homer, *supra* note 11, at

In perhaps the central passage of her essay, Polikoff states:

If my hypothesis about the process of change is correct, then we must measure the value of the work it will take to legalize lesbian and gay marriage by how closely the arguments we make in advocating this change match what we really believe about and want for our relationships and our community.¹⁰⁶

Here I find myself differing with Polikoff on at least three points.

First, I believe her hypothesis that social change is the result primarily of rhetoric and revolution is incorrect, or at least incomplete. In my view, social change occurs through the possibilities enlarged by each gain in altered reality and evolution. Thus, I also believe we should measure the value of our work by what it actually achieves, not by our tactics or by the purity, presence, or prominence of some or all of the arguments possible.¹⁰⁷ Finally, I suspect I have a different understanding of, or emphasis on, who "we" are.¹⁰⁸

1. *Theories of Social Change, "Rhetoric" Versus "Reality," and Lessons From the Battles for Abortion Rights*

Polikoff lays out her hypothesis about the process of social change in a discussion of the battle for abortion rights in America. She contends that by discarding "the rhetoric of radical transformation" and thus "shifting their strategy, abortion rights activists lost the transformative potential of women's ready access to abortion."¹⁰⁹ Here, I must contest her emphasis on rhetoric rather than on reality (by which, in the abortion context, I mean the actual improvement in access to abortion, or actual progress in eliminating restrictions on choice).

Granted, both rhetoric and reality possess transformative potential. However, waving the red flag of "abortion on demand" in a losing war, while perhaps pure, hardly compares in importance with actually securing women's access to abortion on the ground, and *then* revisiting the newly transformed landscape to liberate new territory over time. In the specific

512-13. Contrary to Homer's implication in his critique of the transformative potential of *Baehr*, a court decision's impact begins, not ends, with its literal holding and formal doctrines. Homer is not the only legal commentator to overstate his case in that regard while still offering valuable guidance to judges and advocates. See Kenneth L. Schneyer, *Avoiding the Personal Pronoun: The Rhetoric of Display and Camouflage in the Law of Sexual Orientation*, 46 RUTGERS L. REV. 1313, 1381-89 (1994) (criticizing Justice Levinson's conservative rhetoric in *Baehr* and its limited doctrinal foundations). Perhaps the fault lies in a focus on law to the exclusion of other loci of social change. As Mark Twain put it, "If the only tool you have is a hammer, all your problems start to look like nails."

106. Polikoff, *supra* note 11, at 1549.

107. In any case, in seeking marriage, we have frequently spoken in a rhetoric of transformative potential and revolutionary gain. See, e.g., LAMBDA UPDATE, *supra* note 17, at 23.

108. See *supra* text accompanying notes 81-85.

109. Polikoff, *supra* note 11, at 1541-42.

cases of abortion and feminist liberation, the choice in tactics initially accomplished real improvements and created the opportunity for just such further progress.¹¹⁰ With the abortion victory won and access secured, the movement could have gone on to protect, and then to build on, its indispensable, prerequisite gain. Whatever we called it at any particular moment, that new *reality* would have meant progress in freeing women from the obligations of unwanted or unplanned pregnancy, in decoupling sex from procreation, and in empowering women to make life choices for themselves. Any rhetorical shift employed to secure the new reality may have been disappointing, but need hardly be considered conclusive or irrevocable.

It is true that a period of regression has followed the legal victory in *Roe v. Wade*¹¹¹ and the improvements it wrought for women in securing access to abortion and other areas of privacy and choice.¹¹² However, the cause of this regression was not the shift in strategy and rhetoric to which Polikoff points. Rather, as stated in a passage Polikoff herself quotes, the

110. See DAVID J. GARROW, *LIBERTY AND SEXUALITY* 78 (1994) (arguing that the real impact of a court decision such as *Griswold v. Conn.*, 381 U.S. 479 (1965) (upholding married people's right to use contraceptives) is a revolution in the actual availability of contraception and thus choice); *id.* at 577-78, 617 (the uncertainty involved in winning access to abortions prior to the revolution effected by *Roe v. Wade*, 410 U.S. 113 (1973)); see also Steven Polgar & Ellen S. Fried, *The Bad Old Days: Clandestine Abortions Among the Poor in New York City Before Liberalization of the Abortion Law*, 8 FAM. PLAN. PERSP. 125, 125 (1976) (noting that before *Roe*, "[p]oor and minority-group women were virtually precluded from obtaining safe, legal procedures, the overwhelming majority of which were obtained by White women in the private hospital services on psychiatric indications"); RACHEL BENSON GOLD, *THE ALAN GUTTMACHER INSTITUTE, ABORTION AND WOMEN'S HEALTH: A TURNING POINT FOR AMERICA?* 3 (1990) (stating that in the two-and-a-half years before *Roe*, almost 350,000 women left their home states to obtain abortions more readily available under New York's more liberal laws). As with the parallels between the same-race and different-sex restrictions, it is important not to forget how bad things were before reform.

111. 410 U.S. 113 (1973) (holding that state criminal abortion laws that except from criminality only a life-saving procedure on the mother's behalf violate the due process clause of the Fourteenth Amendment, which protects the right to privacy).

112. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (holding that restrictions on abortion are only unconstitutional when they impose an undue burden on a woman's right to choose); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (holding that state restrictions on the use of public employees and facilities does not constitute an undue government burden on a woman's right to choose abortion, even when those restrictions amount to a complete ban on the performance of nontherapeutic abortions in public hospitals).

The organized, often violent efforts of extremist anti-choice organizations and individuals—only belatedly countered by those committed to choice and women's rights, and inadequately addressed by the law—have led to a decline in the availability of abortion services in the past several years. See *Abortion Clinics Seek Doctors But Find Few*, N.Y. TIMES, Mar. 31, 1993, at A14; see also Stanley K. Henshaw & Jennifer Van Vort, *Abortion Services in the United States, 1987 and 1988*, 22 FAM. PLAN. PERSP. 102, 106 (1990) (noting that abortion services are available in only 17 percent of the counties in the United States); NATIONAL ABORTION FEDERATION, SUMMARY OF EXTREME VIOLENCE AGAINST ABORTION PROVIDERS AS OF JUNE 1, 1993: OTHER REPORTED INCIDENTS OF SERIOUS VIOLENCE (1993). This is not a question of the rhetoric employed; it is a matter of sticking with the battle over the long haul against ferocious opposition.

setback occurred because "[t]he abortion rights movement essentially folded after abortion became legal."¹¹³

It is *this* strategic error to which we can more accurately attribute the renewed erosion in women's position vis-a-vis meaningful access to abortion. Had we kept up the fight, the transformative potential of women's reproductive (and other) freedom would have remained in the forefront, and we would not subsequently have lost so much ground in the reality of access to abortion itself. Polikoff's rhetoric-centered contention that the big problem was that "[t]he pro-choice movement attempted to sanitize its own demands" simply does not stand up.¹¹⁴ The far more basic problem is that the movement "essentially folded" in its efforts to safeguard and further extend the post-victory altered reality.¹¹⁵ It is this I hope to avoid in the pre- and post-*Baehr* phases of the battle for the right to marry.¹¹⁶

Critics of our work for marriage rights repeatedly confuse the disappointment that arises from our failure to build on our gains with the notion that winning without full rhetorical flourish is the cause of setbacks. Their overemphasis on rhetoric thus misses the transformative potential of new

113. Polikoff, *supra* note 11, at 1542 n.29 (quoting Marlene Fried, *Transforming the Reproductive Rights Movement: The Post-Webster Agenda*, in FROM ABORTION TO REPRODUCTIVE FREEDOM 5-6 (Marlene Fried ed., 1990)). The danger of complacency was not lost on those involved in the struggle up through the victory in *Roe v. Wade*, 410 U.S. 113 (1973). See GARROW, *supra* note 110, at 604 (quoting one activist's observation that "one of the most dangerous things that could happen now is that women could sit back and think that they have won"). Of course, the election of hostile presidents throughout the 1980s, and the cramped constitutional vision of most of the judges they appointed, help explain much of the regression that followed *Roe* (as well as our 5-4 defeat in *Hardwick*).

114. Polikoff, *supra* note 11, at 1542 n.29. Nor is this true. The rhetoric deployed to win the rights at stake shifted throughout the 50-year battle leading up to *Roe v. Wade*, including Sarah Weddington's decision not to extol abortion itself in her argument before the Supreme Court. See also GARROW, *supra* note 110 at 274, 571.

115. See GARROW, *supra* note 110, at 629-33 (noting the increasingly defensive posture of the pro-choice movement in light of successful Congressional and judicial efforts to limit access to abortion during 1978-79).

116. The error of failing to build on victories is similarly characteristic of the lesbian and gay movement, although we more often "fold" after setbacks or err in choosing only one methodology to begin with. Part of Homer's critique of *Baehr* is the contention that "[s]tates with same-sex sodomy laws may recognize same-sex marriages performed in Hawaii," but only in some second-class fashion. Homer, *supra* note 11, at 513-16. He also suggests, as Polikoff implies, that winning marriage rights might divide unmarried and married lesbians and gay men, "introduc[ing] into gay culture, for the first time, the concept of pre-marital sex." *Id.* at 513. Like other critics, Homer seems to consider the fact that winning equal marriage rights is "no magic wand to cure" all discrimination or injustice to be an argument against marriage or equal marriage rights themselves. *Id.* at 506. His arguments seem to assume that we would just "fold" after a win in *Baehr*.

While I disagree with Homer's speculations as to the limited value of winning equal marriage rights and the legality (or likelihood) of a hierarchy of marriages (with gay people's marriages treated as legally inferior), his arguments should serve as reminders that our work is not finished when we win any particular battle. We must assure gay and lesbian equality, eliminate marital status discrimination, protect and support all families, and empower people to shape their own lives with due respect for others. No one vehicle or victory will do it all.

reality. Oddly, they undervalue actual gains that tangibly improve real people's lives while putting far too much weight on any one vehicle—be it the substantive achievement of increased access to abortion or equal choice regarding marriage, or such social change mechanisms as litigation or the courts themselves.¹¹⁷ Any of these objectives may be *necessary* for liberation: to be free and equal, a woman must have control over her body, sexuality, and life plan; to be free and equal, lesbians and gay men must be able to participate in all the institutions of society; to protect the vulnerable and assure individual liberty, courts must defend constitutional rights. No one vehicle, however, need be deemed *sufficient* for the ultimate achievement of liberation.

A look at *Baehr v. Lewin* further limns the error in emphasizing rhetoric over reality as the way to value the potential for social change. Because Polikoff never mentions our victory in *Baehr*, she never discusses the grounds of that victory: that the restriction on same-sex marriage constitutes gender discrimination under the equal protection guarantees of Hawaii's constitution's equal rights amendment. Over and over, opponents of the ERA contended in gleefully horrified tones that the ERA would require same-sex marriage.¹¹⁸ Most ERA supporters were more than willing to "concede" (futilely, as it turned out) that it would not.¹¹⁹ Despite (or maybe because of) such sanitizing and refusing to go to the mat rhetorically, sure enough we got an equal rights amendment in Hawaii (although not nationally),¹²⁰ and the breakthrough ruling in *Baehr v. Lewin* followed.

117. Clearly, judicial triumphs can have revolutionary impact, but not in themselves be revolutionary. See, e.g., GARROW, *supra* note 110, at 599; Schneyer, *supra* note 105, at 1381-89 (criticizing Judge Levinson's ruling in *Baehr* for failing to address issues of sexuality in same-sex marriages while recognizing the right to same-sex marriage). Ultimately, to fully secure revolutionary social change, we need more than just a judicial strategy or outcome. As Professor Fowler V. Harper, one of the chief architects of *Griswold v. Conn.*, 381 U.S. 479 (1965), stated in 1948: "[l]aw is not changed by argument. It is changed by necessity." GARROW, *supra* note 110, at 705.

118. See, e.g., Singer v. Hara, 522 P.2d 1187, 1190 n.5 (Wash. Ct. App. 1974); Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573, 583-89 (1973).

119. See Law, *supra* note 94, at 232. Professor Law notes that ERA advocates were not alone in trying to advance their cause by deflecting claims about its transformative potential: "Opponents of the fourteenth amendment claimed that a constitutional guarantee of racial equality would authorize interracial marriage. Opponents of the Equal Rights Amendment claimed it would require lesbian and gay marriage. In both cases, those who supported expanded equality denied the charge." *Id.*; see also Singer v. Hara, 522 P.2d 1187, 1190 n.5 (Wash. Ct. App. 1974) (describing public debate prior to the vote on the ERA in the state of Washington); *The Legality of Homosexual Marriage*, *supra* note 118, at 584; Alfred Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent*, 52 VA. L. REV. 1224, 1232 (1966). The parallels continue; despite the tactical and rhetorical choices made in securing passage of the Fourteenth Amendment and of the ERA, choices that Polikoff deplors, we now have both *Loving* and *Baehr*.

120. In *Baehr*, the Supreme Court of Hawaii noted that the state Equal Rights Amendment is "substantially identical with the proposed Equal Rights Amendment of the United States Constitution." 852 P.2d 44, 65 *clarified on grant of reconsideration in part*, 852 P.2d 74 (Haw. 1993).

Which made more of a difference: the rhetoric and tactics involved in attempting to win an ERA, or the reality of securing one and then returning to the scene of the victory and building on it?

Our victory in *Baehr* illuminates another way in which the process of social change is more complex than Polikoff hypothesizes in her critique. *Baehr* is not only the first court decision upholding gay people's equal marriage rights: it is also the case that "resolve[d] once and for all the question left dangling . . . [as to whether] sex is a 'suspect category' [deserving strict scrutiny] for purposes of equal protection" ¹²¹ For this reason, too, civil rights and women's rights advocates have hailed the decision and have rallied to solidify the gain. ¹²²

2. *Lessons From the Battles To End Anti-Gay Discrimination By the Military*

Polikoff also draws on our battle against anti-gay discrimination in the military as an analogy to support her hypothesis of the process of social change. ¹²³ She argues:

[R]hetoric voiced in the campaign to end the military's practice of excluding lesbians and gay men is useful in imagining how a campaign to end the exclusion of lesbians and gay men would be shaped . . . [:] neither critiquing the institution of marriage nor acknowledging the transformative potential of allowing lesbians and gay men to enter into state-sanctioned unions. ¹²⁴

As a result, Polikoff contends, the necessary "underlying critique of the institution, be it the military or marriage, becomes not only secondary but marginalized, even silenced," with disastrous consequences for lesbians and gay men. We, she believes, are better served by a "rhetorical strategy" that emphasizes differences rather than similarities, and by shunning what she and many others consider flawed social institutions, rather than engaging with them. ¹²⁵

121. *Id.* at 67. At the federal level, sex is a "quasi-suspect classification" that receives intermediate, as opposed to strict, scrutiny. *Craig v. Boren*, 429 U.S. 190, 204 (1976) (finding that gender-based classifications must serve important governmental objectives and be substantially related to those objectives); *see also*, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (holding that gender-based classifications are inherently suspect and must be subject to strict scrutiny).

122. Feminist and civil rights groups in Hawaii have applauded the *Baehr* decision and called for its implementation. Supporters include the Hawaii Women's Lawyers Association, the Hawaii Women's Political Caucus, the National Abortion Rights Action League of Hawaii, Planned Parenthood, the University of Hawaii Women's Center, the American Association of University Women, the Afro-American Lawyers Association, the Japanese-American Citizens League, the Native Hawaiian Legal Corporation, the National Asian Pacific American Bar Association, the American Civil Liberties Union of Hawaii, the National Employment Lawyers Association, and the Hawaii Civil Rights Commission.

123. Polikoff, *supra* note 11, at 1543.

124. *Id.*

125. *Id.* at 1549.

In some respects, I believe the military analogy is apt. Our efforts to be included in that important social institution raise similar issues of choice, equality, civic participation, and respect for diversity in opinion, class, and social circumstance. On the other hand, marriage is vastly different from the military. Most lesbians and gay men, like most Americans, probably have little or no desire to subject themselves to the demands or ethos of military life. By contrast, most gay people, like our non-gay sisters and brothers, undoubtedly do desire the commitment, affirmation, support, and benefits that marriage represents.¹²⁶

a. The Transformative Potential of Gay People's Inclusion in the Military and in Marriage

Even on their own terms, the lessons Polikoff proposes to draw from the 1993 chapter of our struggle to end military discrimination do not prove her point about our fight for marriage rights. First, whatever the rhetoric or tactics used, securing the fortified presence of open lesbians and gay men in the military, as with women and, in a different manner, racial minorities, would indeed have transformative potential.¹²⁷ Indeed, Polikoff candidly concedes this point: "[T]he potential for transformation does exist if the ban is limited."¹²⁸

Despite Polikoff's doubts, the same is true for marriage. As Professor Sylvia Law has written:

Gay people and feminists violate conservative ideology of family in many ways. . . . [W]hen homosexual people build relationships of caring and commitment, they deny the traditional belief and prescription that stable relations require the hierarchy and reciprocity of male/female polarity. In homosexual relationships authority cannot be premised on the traditional criteria of gender. For this reason lesbian and gay couples who create stable loving

126. See, e.g., PHILIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES* 45 (1983) ("'Couplehood,' either as a reality or an aspiration, is as strong among gay people as it is among heterosexuals."); Letitia Ann Peplau & Hortensia Amaro, *Understanding Lesbian Relationships*, in *HOMOSEXUALITY: SOCIAL, PSYCHOLOGICAL, AND BIOLOGICAL ISSUES* (William Paul, James D. Weinrich, John C. Gonsiorek & Mary E. Hotvedt eds., 1982). The *Advocate's* 1994 survey reported that "[m]ost gay men state a clear preference for long-term relationships." Lever, *supra* note 70, at 23-24. For additional information and materials on the reality of lesbian and gay lives and relationships, contact Lambda Legal Defense & Education Fund, 666 Broadway, 12th Floor, New York, NY 10012.

127. Polikoff, *supra* note 11, at 1547-48 (citing Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 545-46 (1991). Professor Karst is also the author of the landmark article, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980), and an advocate of equal marriage rights. While I agree with Karst's insights into the transformative potential of desegregating and uncloaking gay participation in the military, I think the case for the transformative potential inherent in same-sex couples marrying is even stronger. After all, one merely *joins* the military, whereas each couple is married, and has its own marriage.

128. Polikoff, *supra* note 11, at 1547.

relationships are far more threatening to conservative values than individuals who simply violate the ban against non-marital or non-procreative sex.¹²⁹

Law's claim that in gay relationships "authority *cannot* be premised on the traditional criteria of gender" is not precisely true, as Polikoff points out in her critique of Eskridge's cross-cultural history of marriage by same-sex couples.¹³⁰ Like non-gay people, gay people grow up in a gendered and discriminatory world and are thus capable of recreating unequal gender roles. For the most part, we, too, are not saints.¹³¹ Moreover, gender is more than just sex.¹³² Gender classifications involve a complex set of expectations and stereotypes about appropriate behavior and roles beyond a person's physical status as male or female—defined genitally, chromosomally, or otherwise. For better or worse, same-sex couples, too, can reflect social attitudes about masculinity, femininity, and gender roles. They can also create roles of their own—sometimes empowering ones.¹³³

Even so, Law's main point, that same-sex couples getting married can powerfully challenge gender roles and thus destabilize sexism, is clearly true. The evolving and evolved conceptions of marriage in our society distinguish a same-sex couple's marriage, from that, say, of the Native American *berdache*, where a male for ceremonial and social reasons "take[s] on some of the characteristics and perceived responsibilities of the opposite sex," and "dresse[s] in female garb."¹³⁴ In our America and in our movement, marriages between women or between men will be at least as much a match of equals as marriages of different-sex couples. Our marriages will indeed present a challenge to anti-feminist marriages and the subordination of women.

129. Law, *supra* note 94, at 218; see also Mary Ann Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643, 1663 n.85 (1993); ("The perceived danger posed by homosexual relationships is that they present an opposing and threatening metaphor of equality, mutuality and respect that, if adopted as a model for heterosexual relationships, would seriously endanger male prerogatives of freedom, excess and authority which men have been taught to expect and hold dear."); *The Final Report of the Task Force on Family Diversity for the City of Los Angeles*, Supp. Part I, S-206-07; Koppelman, *The Miscegenation Analogy*, *supra* note 34, at 159 ("Homosexuality threatens not the family as such, but a certain traditional ideology of the family.").

130. Polikoff, *supra* note 11, at 1537-41. See also GEORGE CHAUNCEY, *GAY NEW YORK* (1994) *passim* (describing a taxonomy of gender roles and gay identity, attraction, and activity far more complex than Law's formulation).

131. But see BOSWELL, *supra* note 90, at 135, 160 (noting that lesbian and gay "paired saints" are prevalent in Christian rituals, including ceremonial unions).

132. See, e.g., EVE KOVOSKY SEDGWICK, *THE EPISTEMOLOGY OF THE CLOSET* 27-30 (1990) (arguing that the study of sexuality is not coextensive with the study of gender).

133. See Polikoff, *supra* note 11, at 1540 n.23 (describing lesbian "butch-femme" relationships).

134. See Eskridge, *supra* note 11, at 1419, 1454, 1435-69 (noting that such institutions as *berdache*, decoupling gender roles from sex alone, also have power).

Interestingly enough, despite the fact that married lesbian or gay couples may be deemed, in Law's words, "threatening to conservative values,"¹³⁵ other commentators make the "conservative case for gay marriage."¹³⁶ That conservative case holds that equal marriage rights for lesbians and gay men would "foster social cohesion, emotional security, and economic prudence," much as marriage ostensibly does for non-gay people, without being a "radical break with social custom."¹³⁷ Thus, one conservative commentator argues that "legal gay marriage could also help bridge the gulf often found between gays and their parents. It could bring the essence of gay life—a gay couple—into the heart of the traditional straight family in a way the family can most understand. . . ."¹³⁸ He concludes: "Given the fact that we already allow legal gay relationships, what possible social goal is advanced by framing the law to encourage those relationships to be unfaithful, underdeveloped, and insecure?"¹³⁹

Feminists, and apparently the *Baehr* court, see equal marriage rights for lesbians and gay men as connected to the fight against sexism. Some conservatives see equal marriage rights as stabilizing and socially advantageous. Most lesbians and gay men see the right to marry as, first and foremost, a fundamental choice they wish to make for themselves as a basic part of their life plan together.¹⁴⁰ The brilliance of our movement's taking on marriage is that marriage is, at once and truly, both conservative *and* transformative, easily understood in basic human terms of equality and respect, and liberating in its individual and social potential.

b. Tactics, Timing: Legal Obstacles, Legal Challenges

Having conceded the transformative potential of winning the battle against military discrimination in "reality," Polikoff returns to her critique of the "rhetoric" deployed (and not deployed). She states that the ad-hoc and abortive Washington, D.C.-based Campaign for Military Service and

135. Law, *supra* note 94, at 218.

136. Andrew Sullivan, *Here Comes the Groom: A (Conservative) Case for Gay Marriage*, NEW REPUBLIC, Aug. 28, 1989, at 20 (emphasis added); see also Lewis, *supra* note 11, at 1799 (stating that the substantive right to equality is an "affirmative right to connection to and response from the community" and homosexuals' "right to marry originates from this broader right of attachment"); Stephen Chapman, *Gay Moms and Gay Marriage: Can We Find a Better Way?*, CHI. TRIB., Dec. 1, 1994, at 31 (pragmatic argument for equal marriage rights, concluding that with reference to solving social problems, "what's good for gays would also be good for everyone else."); Jonathan Rauch, *A Pro-Gay, Pro-Family Policy*, WALL ST. J., Nov. 29, 1994, at A22 (similar).

137. Sullivan, *supra* note 136, at 22.

138. *Id.*

139. *Id.*

140. My co-counsel observes: "You get your intellectuals, scholars, and activists in debate. It's a good debate, and it has to take place. But most people out there, their concerns are health benefits, security, better lives for their partners and children. They're not interested in politics—gay, straight, or any other kind." Kimberley Griffin, *To Have and To Hold: Gay Marriage, The Next Frontier*, WINDY CITY TIMES, June 2, 1994, at 1, 32 (quoting *Baehr* co-counsel Dan Foley).

other gay groups elected not to make all the arguments,¹⁴¹ “subjugated” their own “antimilitarist” sentiments, and erred by failing to engage full time and up front in the threatening discourse of revolutionizing the military.¹⁴²

Just as [such anti-military discourse and deeper transformative objectives] are not politically viable reasons to advocate ending the military ban, so are they unlikely grounds around which to build support for legalizing lesbian and gay marriage. *The danger in both instances is that the underlying critique of the institution, be it the military or marriage, becomes not only secondary but marginalized, even silenced.*¹⁴³

This is untrue even on its own terms. The advocates’ choice of rhetoric and tactics is more fairly characterized as “prioritizing” rather than as “marginalizing” or “silencing” other or later tactics or critiques. Nevertheless, it suggests another point about the process of social change. The desirability of multi-faceted discourse and strategy is one reason why it is fortunate that we have different people in different positions: street and community activists, lobbyists, organizers, and academics, as well as advocates and attorneys with specific cases. No one vehicle or voice can or must do it all.

Consider the methodology of social transformation represented by the story of the Trojan Horse.¹⁴⁴ We are told that after ten years of “in your face” aggression, leading Greek warriors hid inside the wooden horse in silence. The Trojans were suspicious and would not have brought the horse within their walls until another Greek, Sinon, posing as a traitor, tricked them into doing so. He persuaded the Trojans to breach their walls by telling them that such action was the last thing the Greeks would have wanted, and that doing so would secure Troy’s immortal prosperity. Sinon did not say, “We want you to bring our horse into your city so that we can tear the city down in keeping with our radical vision.” Despite his tactical

141. For example, Polikoff suggests that activists did not make the argument that “the presence of lesbians and gay men would transform social attitudes towards homosexuality as a result of the close contact between heterosexual and homosexual service personnel.” Polikoff, *supra* note 11, at 1549. In fact, at Lambda we often make just this point, citing the body of evidence that indicates that those who know openly gay people shed their intolerance. See Wolfson, *supra* note 32, at 39 n.69. Although we do not cite this dynamic as the key reason to lift the military ban, we quote President Clinton to further drive home how policies punishing openly gay identity make the government not just an accomplice to, but also the perpetrator of, the real and presumed anti-gay prejudice of some in the military: “[T]hose who have studied this issue extensively have discovered an interesting fact[:] People in this country who are aware of having known homosexuals are far more likely to support lifting the ban.” Clinton: *Policy on Gays in Military is ‘Sensible Balance’*, WASH. POST, July 20, 1993, at A12 (announcing the Clinton Administration’s version of the discriminatory military policy).

142. Polikoff, *supra* note 11, at 1544-49.

143. *Id.* at 1549 (emphasis added).

144. See VIRGIL, THE AENEID II, at 18-370.

choice of a more modest discourse, and notwithstanding the silence of the Greek warriors actually inside the horse, transformation did occur—a fairly radical one, in fact—once the Greeks got their horse within the walls of Troy. The story illustrates the point that sometimes the people arguing cases or battling in the trenches are not best placed to say just anything or to reveal everything.

Polikoff herself has described this quandary in other legal contexts. In one important article, she observed: “The courtroom is no place in which to affirm our pride in our lesbian sexuality, or to advocate alternative child-rearing designed to produce strong, independent women.”¹⁴⁵ While I think (and Polikoff may now agree) that this flat claim is overstated, it helps prove the point that in each forum we must carefully select our rhetoric and tactics. Moreover, we may do so without necessarily betraying ourselves or foreclosing future progress on other parts of our vision, however radical. Our choices must be shaped, in Polikoff’s words, by “remember[ing] that our efforts are not made in a vacuum. . . .”¹⁴⁶

Polikoff’s pioneering custody rights articles, for example, counsel litigants that “[a] lesbian mother is very likely to lose [custody of her children] if the civil rights of lesbian mothers in general are allowed to take center stage. . . .”¹⁴⁷ Moreover, Polikoff counsels a pragmatic approach toward courts’ misconception that “a child raised by a homosexual is likely to become homosexual.” She details how to refute the factual underpinnings of the premise, rather than as a matter of tactics, urging litigants to seize that moment to put forward a more radical response embracing the premise in an anti-heterosexist diatribe.¹⁴⁸ Some might say that the latter tactic is why we have academics (let alone law reviews).¹⁴⁹

Nonetheless, Polikoff contends: “There is no way to publicly critique the military and simultaneously ask to be let into it”¹⁵⁰ She thus

145. See Polikoff, *supra* note 82, at 907.

146. *Id.* at 910.

147. Nan D. Hunter & Nancy D. Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFF. L. REV. 691, 721 (1976). In this article, Polikoff counsels that the “first goal is to keep lesbianism out of the trial altogether, not to debate it in detail.” *Id.*

148. *Id.* at 723-24.

149. Lest this be misconstrued as a swipe, I hasten to point out that just as I wear at least two hats (gay rights advocate at Lambda and adjunct law professor at Columbia University), so does Polikoff (law professor at American University and long-time activist attorney). Many people engaged in this and other marriage debates, such as Nan Hunter, Bill Eskridge, and Mary Dunlap, have been involved in both academic and activist advocacy. However, while academic articles usefully explore gaps and idealizations in legal and strategic thinking, they may also be somewhat removed from the actual possibilities, challenges, and work at hand.

150. Polikoff, *supra* note 11, at 1545.

suggests, referring to the conclusions of one gay journalist, that "the advantages of a campaign for military inclusion do not outweigh the disadvantages" ¹⁵¹ "By the same token," Polikoff writes, "I believe that an effort to legalize lesbian and gay marriage would make a public critique of the institution of marriage impossible." ¹⁵²

To this contention, I find myself again responding that this is simply not true. It is not all or nothing. Does everyone who gets married, from Ruth Bader Ginsburg to Catherine MacKinnon, endorse every retrograde aspect of marriage? Does everyone who participates in an institution, whether it be the National Gay & Lesbian Task Force or the practice of law, become co-opted and incapable of proposing or achieving reform? And just what or whose exact public critique are we talking about anyway? While many gay people may share Polikoff's anti-military sentiments, it seems to me that the most pertinent critique of our 1993 efforts against anti-gay discrimination in the military is not that we failed to deconstruct the military, but rather that we failed to end the discrimination.

Polikoff further laments that in the context of marriage challenges, "[l]ong-term, monogamous couples would almost certainly be the exemplars of the movement. . . ." ¹⁵³ This is probably more or less true, just as our military cases over the past twenty years have tended to involve outstanding service personnel such as Joe Steffan, Dusty Pruitt, and Greta Cammermeyer. ¹⁵⁴ But the same tactical phenomenon is true for most test cases, ¹⁵⁵ including those we bring in the areas I believe Polikoff agrees we

151. *Id.*

152. *Id.* at 1546.

153. *Id.*

154. *Steffan v. Aspin*, 8 F.3d 57, 59 (D.C. Cir. 1993), *rev'd on other grounds*, *Steffan v. Perry*, 41 F.3d 677 (D.C.Cir. 1994) (en banc) (referring to plaintiff Steffan as "one of the Academy's ten highest ranking midshipmen" with an "exceptional," "exemplary" record); *Pruitt v. Cheney*, 963 F.2d 1160, 1161 (9th Cir. 1991), *cert. denied*, 113 S.Ct. 655 (1992) (affirming dismissal of First Amendment claim and remanding Equal Protection claim to allow the military to show a rational basis, despite Army Major's "outstanding record in both active and reserve service. . . ."); *Cammermeyer v. Cheney*, 850 F. Supp. 910, 912 (W.D. Wash. 1994) (hailing colonel and chief nurse in Washington State National Guard, who was awarded the Bronze Star for distinguished service in Vietnam, hailed as "remarkable").

155. Indeed, Professor Case points out that the same critique can be made of the decision in *Braschi v. Stahl Assocs.*, 543 N.E.2d 49, 53 (N.Y. 1989) (defining family to include gay couples), *cited in* Case, *supra* note 129, at 1664-66. *Braschi* is a victory always touted by those in our community who are less disposed to advocating for gay people's right to marry. *Id.* For a fuller discussion of *Braschi*, see *infra* note 159.

should proceed, such as domestic partnership¹⁵⁶ and second-parent adoptions.¹⁵⁷ We tell stories, and often select plaintiffs, not only to educate the public, but also to help us win cases and the battle at hand.¹⁵⁸ The choice of this tactic, hardly unique to the lesbian and gay rights movement, does not govern the scope of our objectives. Clearly, our objectives must include serving all gay people—not just the relatively less disenfranchised.¹⁵⁹

Several marriage critics express a concern that winning the right to marry may somehow “delegitimiz[e] some of us in the eyes of other gays and lesbians in the name of legitimizing all of us in the eyes of heterosexuals.”¹⁶⁰ This will only be true if we let it be true.¹⁶¹ Professor Ruthann

156. “Domestic partnership” refers broadly to recognized committed relationships between people who cannot or choose not to marry. The term is also used to refer to specific relationships formalized under government ordinances or private institutional policies. A comprehensive survey of domestic partnership is beyond the scope of this essay. For such a survey, see Craig A. Bowman & Blake M. Cornish, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164 (1992); see also LAMBDA LEGAL DEFENSE & EDUCATION FUND, NEGOTIATING FOR EQUAL EMPLOYMENT BENEFITS: A RESOURCE PACKET (July 1994) (updated periodically); David J. Jefferson, *Gay Employees Win Benefits for Partners At More Corporations*, WALL ST. J., Mar. 18, 1994, at A1.

In Lambda’s groundbreaking “domestic-partnership” case seeking equal health benefits for the lesbian and gay life partners of New York City employees, *Gay Teachers Ass’n v. Bd. of Educ.*, No. 43069/88 (N.Y. Sup. Ct. Aug. 12, 1991) (denying motion to dismiss), *aff’d*, 585 N.Y.S. 2d 1016 (N.Y. App. Div. May 12, 1992), our plaintiffs were distinguished, long-term employees and were all in long-term, committed relationships that were explicitly marriage-like. The case was successfully resolved in a settlement requiring that unmarried employees, both gay and non-gay, receive coverage identical to that provided to married employees for their partners and dependents. See Mireya Navarro, *New York Extends Health Benefits to Domestic Partners of City Employees*, N.Y. TIMES, Dec. 27, 1993, at B1; Peter Freiberg, *City Workers Get Partner Benefits*, WASH. BLADE, Nov. 5, 1993, at 21.

157. See, e.g., *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993) (granting adoption to petitioners, a surgeon and a nationally recognized expert in the field of breast cancer, who were both on the Harvard Medical School faculty).

158. See generally Fajer, *supra* note 67, at 511 (arguing that for gay rights litigation to succeed, advocates must tell the stories of the lives of lesbians and gay men, to help dispel non-gay myths about gay life).

159. As New York’s high court suggested in *Braschi v. Stahl Assocs.*, 543 N.E.2d 49, 53 (N.Y. 1989), important legal benefits and protections “should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order. [Benefits and protections] should not rest on fictitious legal distinctions or genetic history, but should instead find [their] foundation in the reality of family life.” Eschewing a litmus-test, the court identified the kinds of factors that should be looked to when assessing a familial relationship, in lieu of sole reliance on marriage:

[T]he exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services. . . . [I]t is the totality of the relationship as evidence by the dedication, caring, and self-sacrifice of the parties that should, in the final analysis, control.

Id. at 55.

160. See Homer, *supra* note 11, at 528.

161. In any case, without equal rights, such an argument seems to put the carriage before the horse. See Eskridge, *supra* note 11, at 1492-93 (refutation of the “new insiders” critique).

Robson, no supporter of equal marriage rights, frankly concedes: "[L]egalized lesbian marriage would not invent the good lesbian/deviant lesbian dichotomy."¹⁶² By contrast, it is certainly likely that winning marriage rights would alter society's understanding of, and attitude toward, gay people and same-sex love generally—the rising tide that raises all boats. We must stick with the fight for a better world through our victories, as well as through our setbacks.¹⁶³

C. *The Critique that Equal Marriage Rights Will Thwart Universal Health Care and a Fairer Distribution of Social Benefits*

Polikoff's concern about the use of "exemplars" actually enfolded yet another claim: "Marriage would be touted as the solution to these couples' problems; the limitations of marriage, and of a social system valuing one form of human relationship above all others, would be downplayed."¹⁶⁴ She thus invokes a third argument against working for equal marriage rights: "Advocating lesbian and gay marriage will detract from, even contradict, efforts to unhook economic benefits from marriage and make basic health care and other necessities available to all."¹⁶⁵ Again, I disagree with this fallacious all-or-nothing choice imposed on social change work, as well as the short shrift such a claim gives to gay people's desire for, and entitlement to, full, equal rights.

Polikoff's claim that advocating equal marriage rights will impede other worthwhile social goals is no truer for marriage than it is for either domestic partnership or parenting, which is to say that it is not necessarily

162. RUTHANN ROBSON, *LESBIAN (OUT)LAW* 128 n.12 (1992) (citing JOAN NESTLE, *A RESTRICTED COUNTRY* 123 (1987)). This concession is critical, as Homer relies upon an earlier work of Robson's to support his "new insiders" critique of marriage. Homer, *supra* note 11, at 528 (citing Ruthann Robson & S.E. Valentine, *Lov(h)ers: Lesbians as Intimate Partners and Lesbian Legal Theory*, 63 *TEMP. L.Q.* 511, 540 (1990)).

163. This, too, is a lesson from the battles against military discrimination. Contrary to the public perception shaped by the actions of the President, the Department of Defense, and Congress, and the unprecedented publicity they generated, challenges to the anti-gay policy did not begin in 1993. Lambda, the ACLU, and courageous plaintiffs have been litigating against military discrimination for over 20 years. See Francisco Valdes, *Sexual Minorities in the Military: Charting the Constitutional Frontiers of Status and Conduct*, 27 *CREIGHTON L. REV.* 381, 398-424 (1994). Since 1993, moreover, we have continued battling in the courts, where we are generally meeting success in rulings by judges who, having been educated by the political process and the lesson that the policy rests solely (and hypocritically) on impermissible prejudice, find that the discrimination lacks even a rational basis. See *Able v. United States*, 847 F. Supp. 1038 (E.D.N.Y. 1994) (granting a preliminary injunction in first challenge to congressional enactment of latest version of policy); *see also, e.g., Meinhold v. U.S. Dep't of Defense*, 34 F.3d 1469 (9th Cir. 1994); *Dahl v. Secretary of the Navy*, 830 F. Supp. 1319 (E.D. Cal. 1993); *Elzie v. Aspin*, 841 F. Supp. 439 (D.D.C. 1993); *Selland v. Aspin*, 832 F. Supp. 12 (D.D.C. 1993); *but see Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (en banc decision upholding military discrimination against gay service members), *vacating*, 8 F.3d 57 (D.C. Cir. 1993).

164. Polikoff, *supra* note 11, at 1546.

165. *Id.* at 1549.

true at all.¹⁶⁶ As I have argued elsewhere, we can, and should, advocate for universal health care alongside marriage, as well as alongside domestic partnership.¹⁶⁷ It is not antithetical to believe that gay people should be able to exercise the equal right to marry, and at the same time believe that other family forms—including perhaps, but not limited to, domestic partnership—are valuable and should be treated fairly.

In fact, more often domestic partnership is held out as a substitute for equal marriage rights. For example, in response to *Baehr*, the Hawaii legislature considered legislation that would have created statewide domestic partnership for same-sex couples and confined marriage to different-sex couples.¹⁶⁸ The bill's sponsor bluntly conceded that the domestic partnership bill was intended to ward off an ultimate ruling by the Supreme Court in favor of equal marriage rights.¹⁶⁹

Intra-community critics of equal marriage rights efforts also frequently invoke domestic partnership as the alternative the movement should pursue as its priority, often presenting the decision as an either-or. For example, one frequently-cited marriage critic has been quoted as opposing cases such as *Baehr v. Lewin* in part because of her belief that "[i]f gays and lesbians were allowed to marry tomorrow, I can guarantee that the entire

166. I thus disagree with Professor Robson, who nevertheless carries Polikoff's ideas to their logical conclusion. Robson attacks not only the goal of equal marriage rights for gay people, but the strategy of seeking family recognition, whether in cases Polikoff and others of us applaud, such as *In re Guardianship of Kowalski*, 478 N.W.2d 790, 796 (Minn. 1991) (Sharon Kowalski's lover, Karen Thompson, had to fight a seven-year legal battle to see her after Sharon was injured in a car accident), or through domestic partnership:

I find the arguments against marriage convincing, even when they extend to quasi-marriage arrangements offered by the state, including domestic partnership. . . . My own conclusion is that our quest for lesbian survival is not furthered by embracing the law's rule of marriage. Our legal energy is better directed at abolishing marriage as a state institution and *spouse* as a legal category.

This conclusion also applies to our arguments to be included within the legal definition of *family*. While the "family of affinity" recognized . . . in the Kowalski case contributes to a good result, its reasoning is not necessarily cause for acclaim. The legal category of *family* is a bit more diffuse than the legal category of *spouse*, but ultimately it may be just as domesticating.

RUTHANN ROBSON, LESBIAN (OUT)LAW 126-27 (1992).

167. Evan Wolfson, Same-Sex Marriage and More, Address at the Fourth Annual Lesbian, Bisexual, and Gay Studies Conference at Harvard University (Oct. 27, 1990); Evan Wolfson, Developments in Family Relationships, Address at Lambda Law (Dec. 4, 1989); see also Wolfson, *supra* note 32, at 31 n.42. Because I believe there is no inconsistency among these demands, I have pressed for our right to marry at the same time as I have worked to win equal health benefits for the unmarried partners of gay and non-gay New York City employees. See *Gay Teachers Ass'n v. Bd. of Educ.*, No. 43069/88 (N.Y. Sup. Ct. Aug. 12, 1991), *aff'd*, 585 N.Y.S.2d 1016 (N.Y. App. Div. May 12, 1992) (settled successfully Oct. 30, 1993) (on file with Lambda Legal Defense & Education Fund).

168. S.Res., 17th Leg., 1994 Haw. Reg. Sess. The legislature ultimately adopted an even less satisfactory version of this bill, which reiterated the different-sex restriction on marital choice while creating a commission to study the needs of same-sex couples who have been discriminated against by denial of equal marriage rights. 1994 HAW. SESS. LAWS 217.

169. Derek Ferrar, *Sleeping with the Legislature*, HONOLULU WEEKLY, Feb. 23, 1994.

domestic-partnership movement would dry up tomorrow. . . .”¹⁷⁰ Coming from a marriage critic, this, if true, is a revealing insight into the lesbian and gay community’s relative support for marriage vis-a-vis domestic partnership, once given a meaningful option (as we will have been, when the Hawaii Supreme Court hands down its final ruling). Assuming her assertion to be true, is she suggesting that the proper course for the movement is to foist domestic partnership on those who would prefer a choice regarding marriage? Or does she mean to suggest that losing marriage as an option is an acceptable price to pay for fueling the domestic partnership “movement”? Moreover, we need not assume her assertion to be true. If Polikoff and others who profess a broad social agenda in fact speak for large numbers of gay and non-gay people, clearly there are many of us committed to meeting the needs of all families and individuals without sole regard to marriage.

The recent trends toward adopting domestic partnership ordinances and policies locality-by-locality and increasing efforts to equalize access to employment benefits company-by-company are welcome and important innovations.¹⁷¹ However, we should make one thing clear: domestic partnership is not marriage.¹⁷² Insisting that lesbians and gay men enter into domestic partnerships, while reserving marriage for different-sex couples, perpetuates without justification (let alone a compelling state interest) the discrimination challenged in *Baehr*. Like most non-gay people, most gay men and lesbians want the equal right to *marry*, not merely access to some other domestic status. If *all* were free to *choose* either domestic partnership or marriage, then it might be appropriate for the state to proffer such an additional status. However, when the state arbitrarily restricts people’s choice, whether based on gender or any other invidiously discriminatory factor, it does not eliminate inequality, but rather reinforces second-class citizenship.

And domestic partnership is indeed second-class. Not only is it unequal to marriage in the sense that “‘separate but equal’ . . . [is] inherently

170. Chris Bull, *Till Death Do Us Part*, *Advoc.*, Nov. 30, 1993, at 40, 46.

171. In recent years there has been an explosion in the number of jurisdictions, companies, universities, and other entities attempting to eliminate marital-status discrimination and to provide some recognition and benefits to gay and often non-gay partners. While five years ago it was possible to name them all off the top of one’s head, now the best way to remain up-to-date is to consult *LESBIAN & GAY LAW ASS’N*, *LESBIAN/GAY LAW NOTES* (Prof. Arthur S. Leonard, ed.) (monthly publication), which is arguably the single most important resource for legal practitioners and academics interested in legal issues regarding gay rights or HIV.

172. For example, even in Denmark, widely regarded as a place where gay people can get “married,” the law in fact provides for a different, if still exceptionally progressive, status and recognition. See Danish Registered Partnership Act, Danish Act 372 (June 7, 1989). The act accords same-sex couples most of the rights, benefits, and protections granted different-sex couples who marry, but glaringly excludes important parenting rights and eligibility to adopt.

unequal,"¹⁷³ but under the domestic partnership ordinances and policies adopted so far, the benefits themselves are not equal to those provided to married partners. For example, many of the ordinances require domestic partners to undertake the responsibilities and legal obligations that accompany marriage, but do not in exchange give domestic partners all the benefits of marriage. Nor do they provide equal recognition. Because they are local, the ordinances do not, and cannot, assure domestic partners the full range of benefits extended married partners at the state level. Even if a state adopted statewide domestic partnership,¹⁷⁴ it would be unable to deliver federal or out-of-state benefits and protections. The ordinances do not—and most likely, under federal law, could not—mandate that private employers treat domestic partners the same as married partners.¹⁷⁵ They thus fail to provide domestic partners parental protections and benefits that are provided to married partners. Marriage is *sui generis* under the United States constitutional, federal, and legal scheme. At the same time, ironically, under most of these laws, the criteria for establishing a domestic partnership are far more onerous than those imposed on a couple seeking to marry.

Thus, in part because of the way our society exalts marriage, domestic partnership falls between two stools: it neither provides the symbolism and substance of marriage, nor resolves the problems of access to needed benefits and protections identified by marriage critics. Domestic partnership fails to resonate with the emotional, declarative, and often religious power most people feel inheres in marriage. It also fails to equalize access to benefits because it is hampered by legal obstacles and itself still excludes people who do not meet the criteria set forth in the ordinances, even though they may be in committed, interdependent, or caretaking relationships.

The domestic partnership approach is a healthy step toward eliminating both marital status discrimination and arbitrariness in the recognition

173. See *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954).

174. To date, no state has established domestic partnership as a defined legal status with benefits and protections, although Vermont recently offered state employees health coverage for their unmarried same-sex and different-sex partners. *Vermont Workers Win Health Benefits*, N.Y. TIMES, June 13, 1994, at A13. France offers similar health coverage to the partners of all employees. Since 1989, Denmark, Norway, and Sweden have gone even further, establishing legal "registered partnerships" or marital unions for same-sex couples, with most, though not all, of the benefits and protections of marriage. See Lawrence Ingrassia, *Danes Don't Debate Same-Sex Marriages, They Celebrate Them*, WALL ST. J., June 8, 1994, at A1. The creation of a separate spousal relationship with the reservation of marriage to different-sex couples can be attributed to the fact that these countries, unlike the United States, have established churches. As a legal matter, marriage *qua* marriage is both civil and religious in those countries.

175. See Bowman & Cornish, *supra* note 156, at 1194 n.152, 1203, 1210 (the ability of local governments to mandate private employees' provision of health insurance benefits "is greatly limited by the federal Employee Retirement Income Security Act (ERISA)," 29 U.S.C. §§ 1001-1461 (1988)).

of valuable family relationships. Recognizing domestic partnerships or adopting policies equalizing access to benefits may even be the best step a locality, private institution, company, or university—as distinguished from a state—can take. Such steps demonstrate the marital nature of gay relationships while illustrating the lack of any compelling state interest that could justify their disparate treatment or segregated status. But, ultimately, domestic partnership alone is not enough. As one non-gay commentator put it in coming out for equal marriage rights: “[T]here is no secular reason that we should take a patchwork approach of corporate, governmental, and legal steps to guarantee what can be done simply, economically, conclusively, and inclusively with the words, ‘I do.’”¹⁷⁶

Our demand as gay people for equal choices and recognition with regard to our family relationships does not undermine our demand as conscientious citizens to decouple benefits from arbitrary criteria of any kind. But, equally, our desire to achieve a more just, contextual allocation of benefits should not require us to accept an inferior status with regard to marriage or other choices. Domestic partnership may fall between the stools; gay men and lesbians should not have to.

D. Critiquing the Critique: Lessons from Other Movements for Social Change

In *Why We Can't Wait*, Martin Luther King, Jr. wrote: “It is an axiom of social change that no revolution can take place without a methodology suited to the circumstances of the period.”¹⁷⁷ No one methodology will be sufficient,¹⁷⁸ nor need we lament “[t]he fact that different organizations place varying degrees of emphasis on certain tactical approaches. . . .”¹⁷⁹ This, of course, was a hard-won lesson of the African-American civil rights movement, in which King and others clashed constantly over pace, direction, priorities, and tone, even when they could agree on the prize.

Contrary to Polikoff's premise regarding rhetoric and betrayal,¹⁸⁰ not only was the radicalization of the civil rights movement's demands gradual, it was non-linear. Each new stage, indeed, each new campaign and strategy, saw various tactical efforts at limitation and focus. For example, during the Montgomery bus boycott, “King conceded to reporters that [the local organizers' original demand] was modest and had cost the protestors the active support of the NAACP.”¹⁸¹ Throughout the civil rights battle,

176. Quindlen, *supra* note 5, at A23.

177. KING, *supra* note 15, at 24.

178. *Id.* at 33 (“Direct action is not a substitute for work in the courts and the halls of government. . . . Indeed, direct action and legal action complement one another; when skillfully employed, each becomes more effective.”).

179. *Id.* at 133.

180. Polikoff, *supra* note 11, at 1541.

181. DAVID J. GARROW, *BEARING THE CROSS* 53 (1986).

key figures such as Bayard Rustin, Stanley Levison, and King himself, struggled with how radical to be in their rhetoric and in their goals.¹⁸²

King grappled with his own role: "I have to be militant enough to satisfy the militant yet I have to keep enough discipline in the movement to satisfy white supporters and moderate Negroes."¹⁸³ King conceded only slowly that he could not achieve a "synthesis," that he would have to elect his own voice and goals, and accept the "cycles" and multiplicity of the movement.¹⁸⁴ One aspect of King's genius was that, even when he was at his most revolutionary, he rarely put his rhetoric or larger vision ahead of the tactics that he thought would work, the goals that he believed were obtainable, or his fundamental principles of non-violence and shared humanity.

Benefiting from these lessons, lesbians, gay men, and non-gay allies of our movement must avoid placing absolutist demands on each other regarding our tactics, rhetoric, and— in a diverse community dedicated to making the world safe for diversity— our goals. We should not poison our debates with false choices, such as marriage *or* universal health care, assimilation *or* liberation, equality *or* difference.¹⁸⁵ In avoiding such absolutist demands and false choices, however, we must be very clear about two things. First, just as "the movement can head into a cul-de-sac if it can see no real progress without radical alteration of the nation,"¹⁸⁶ so will we be marching down a blind alley if we cannot recognize radical alteration when it is not announced with radical rhetoric. Second, those who say they are not opposing our right to marry, but are merely opposing our "making [it] a priority,"¹⁸⁷ are in effect accepting the state's denial of our equal rights. Saying "let's not work for this" is in effect saying "you should not have this," for, as King instructs, "it is a historical fact that privileged groups seldom give up their privileges voluntarily. . . . [F]reedom is never voluntarily given by the oppressor; it must be demanded by the oppressed."¹⁸⁸

Because I ultimately disagree with a rhetoric-centered hypothesis about the process of change, I also cannot agree that we should:

182. *Id.* at 420, 455; see also GARROW, *supra* note 110, *passim*. The same was true in the reproductive freedom movement, with debates occurring over legislative versus litigation strategies, repeal versus reform, and how best to frame demands and arguments.

183. GARROW, *supra* note 181, at 496.

184. *Id.* at 536-37.

185. See Howard Lesnick, *The Wellsprings of Legal Responses to Inequality: A Perspective on Perspectives*, 2 DUKE L.J. 413, 441, 449, 452-53 (1991) (noting characteristic defects in "conservative," "liberal," and "radical" perspectives).

186. GARROW, *supra* note 181, at 420 (quoting Stanley Levison's exhortation to King).

187. Polikoff, *supra* note 11, at 1537.

188. KING, *supra* note 15, at 80. I am indebted to my friends, Janet Weinberg and Roz Richter, for helping me thrash out this point.

measure the value of the work it will take to legalize lesbian and gay marriage by how closely the arguments we make in advocating this change match what we really believe about and want for our relationships and our community.¹⁸⁹

I do know that attorneys for the State in Hawaii have argued that our work there "allowing same[-]sex couples to marry conveys in socially, psychologically, and otherwise important ways approval of non-heterosexual orientations and behaviors."¹⁹⁰ That feels like a pretty good start to me.

III

WINNING AND KEEPING EQUAL MARRIAGE RIGHTS: WHAT IS TO BE DONE

Each girl and boy alike, sharing joy alike,
Feels that passion'll soon be national.
Love is sweeping the country.
There never was so much love.¹⁹¹

189. Polikoff, *supra* note 11, at 1549.

190. Defendant's Response, *supra* note 41, at 7. Those calling the shots in defense of military discrimination also appear to regard same-sex couples marrying as a particular threat above and beyond statements of gay identity. See, e.g., Memorandum from Les Aspin, Secretary of Defense, to the Joint Chiefs of Staff, Policy on Homosexual Conduct [sic] in the Armed Forces, July 19, 1993, at 1-2 ("Homosexual conduct [sic] is a homosexual act, a statement by the servicemember that demonstrates a propensity or intent to engage in homosexual acts, or a *homosexual marriage or attempted marriage*." (emphasis added); see also Valdes, *supra* note 163, at 469-70 (critiquing the military's penalization of "homosexual marriage," as well as "attempted marriage"). Is there anything more revealing of the absurdity, and offensiveness, of the government's position than its enumerated penalty for "attempted marriage?"

Likewise, Pope John Paul II is reported to have recently characterized marriage between lesbians or gay men as "a serious threat to the future of the family and *society itself*." Alan Cowell, *Pope Deplores Gay Marriage*, N.Y. TIMES, Feb. 23, 1994, at A2 (emphasis added). As Garrow demonstrates, similar sweeping predictions of doom were made, for example, regarding birth control. E.g., GARROW *supra* note 110, at 23 (permitting contraception "opens the way for every girl to become a prostitute . . . [and] seventy-five percent of them will."); *id.* at 27 (predicting that were birth control legislation to pass, "twenty-five years from today the State of Connecticut will be a mass of crumbling ruins."); *id.* at 108 ("Japanese birth control devices in the homes of America can be more destructive than Japanese bombers over Pearl Harbor."). I refrain from discussing the obvious church-state separation issues, except to observe once again that our litigation concerns the issuance of civil marriage licenses, not religious ceremony or doctrine.

Describing courts' tendency to "conflate same-sex marriage, flaunting, and activism," Professor Case contrasts the experience of plaintiffs who have sought recognition for their marriages or marriage-like relationships, with that of gay and lesbian plaintiffs who have not. Case, *supra* note 129, at 1669-75. Professor Mary Dunlap concludes: "'Marriage' represents, among other things, a kind of coming out to stay that feels especially dangerous now. Those who have tried to be married have been widely punished for it by the current legal system." Dunlap, *supra* note 11, at 82. Clearly, some people *outside* our community see equal marriage rights as transformative.

191. GERSHWIN, *supra* note 18.

Because of *Baehr v. Lewin*, lesbians' and gay men's equal right to marry now truly "shimmers or lurks—depending on one's point of view—on the horizon of the law."¹⁹² For the first time in living memory, we can realistically hope to see lesbian and gay couples happily joined on an equal footing with our non-gay brothers and sisters — if those who favor equality can put aside their divisions and unite to secure ultimate victory. For this reason, I have urged that we end, or at least suspend, the intra-community debate over whether to seek marriage.¹⁹³ The ship has sailed.

What then is to be done? As indicated above, Lambda gets many calls from lesbian and gay couples who would like to get married in their state. The landmark preliminary triumph in *Baehr* seems to have fueled many people's sense of urgency and hope. We believe people should make informed, careful choices about how we can all best win our rights. People should neither simply go for a "quick fix," nor just sit back and wait. Accordingly, Lambda's marriage strategy is to do everything possible to secure a final victory in Hawaii while temporarily holding back on marriage litigation in states or particular cases in which the prospects for defeat seem great.¹⁹⁴ Impact litigation and test-cases are not the be-all and end-all of social change, and wanting equal choice regarding marriage does not in itself validate every couple's rushing out today to file a lawsuit heedless of the realities where they live. Bringing the wrong suit in the wrong way, even for the right objective, could do serious injury not only to our right to marry, but also to the broader range of lesbian and gay rights. The wrong case, wrong judge, or wrong forum could literally set us all back years, if not decades. There are other ways to do this work.

192. Hunter, *supra* note 11, at 10.

193. As a marriage rights advocate I see value in, and even share, many of the important insights set forth in Homer's *Against Marriage*, see Homer, *supra* note 11. It is hard, however, to see how social change can meaningfully come about from the rhetoric of his brave conclusion: "If we come to heterosexuals and their [*sic*] institution [of marriage], we valorize the mechanism of our oppression. Let them come to us." Homer, *supra* note 11, at 530. It is one thing to reach for the stars, but meanwhile we should remain on this planet. Nor do I think Homer's worldview is shared by most gay people, who decline to accept Homer's "all-or-nothing" choice between "assimilation" and "a false symmetry between gays and lesbians and heterosexuals" on the one hand, and "outlaw status" or romanticized radical difference for its own sake on the other. *Id.* at 506, 530. No matter what either extreme (gay or non-gay) may claim, there is abundant middle ground. We must try to keep our feet on it.

194. This means that bringing lawsuits in other states may not be the best strategic use of resources now, pending the progress in Hawaii. Together with other attorneys and groups who litigate for lesbian and gay rights, we at Lambda have identified several factors to be considered when determining whether or not to pursue litigation. These include whether a state has a "sodomy" law, or has an equal rights or privacy provision in its constitution; whether a state has good case law or legislation regarding personal autonomy, sexual orientation, marital and family status, and gender discrimination; the actual wording of, and decisions regarding, the state's marriage and domestic relations laws; the political climate in the state; and, perhaps most important, the composition of the state judiciary.

At Lambda we constantly point out that courts are only one forum for achieving social change, the right to marry, and respect as a family. Other critical methodologies of social change which we ignore at our peril (as the struggle against military discrimination shows), include political organizing, public education, institution building, and asking for¹⁹⁵ (not just demanding) support from local religious, political, and community leaders and groups.

We must begin the hard work of public education and political organizing now—nationwide and state by state. As with interracial marriage and slavery in the past, the radical right and others will doubtless attempt to invoke “state’s rights” rhetoric to thwart recognition and benefits for gay people who return from Hawaii as married couples or who seek equal marriage rights at home. We must ensure that other states and the federal government fulfill their constitutional obligation to recognize marriages validly contracted in Hawaii. No American should have to have her “marriage visa” stamped every time she crosses a state border.¹⁹⁶

195. Former House Speaker Tip O’Neill used to tell of the critical political lesson he learned:

from Mrs. O’Brien, our elocution- and- drama teacher in high school, who lived across the street. The night before the election, she said to me, “Tom, I’m going to vote for you even though you didn’t ask me to.”

I was shocked. “Why, Mrs. O’Brien,” I said, “I’ve lived across from you for eighteen years. I cut your grass in the summer, I shovel your walk in the winter. I didn’t think I had to ask for your vote.”

“Tom,” she replied, “let me tell you something: *people like to be asked.*”

TIM NOVAK, *MAN OF THE HOUSE: THE LIFE AND POLITICAL MEMOIRS OF SPEAKER TIP O’NEILL* 25 (1987). We, too, must heed this lesson, and begin asking for support even from people, organizations, and institutions that may not say yes the first time. By asking and then paving the way through education and personal encounters, we may even surprise ourselves with who understands the justice and rightness of our demands.

196. I am working with a team of Lambda cooperating attorneys and law students to prepare for the litigation that may arise, following a final victory in Hawaii or elsewhere, if lesbians and gay men are discriminatorily denied recognition of our marriages by other states or the federal government. In a forthcoming article, we will show how nationwide recognition is required under constitutional principles such as “full faith and credit,” as well as under other legal doctrines of federalism, conflicts law, and comity. See Evan Wolfson & Gregory McCurdy, *Let No One Set Asunder: Nationwide Recognition of Gay and Non-Gay People’s Validly Contracted Marriages* (forthcoming) (provisional title).

Other articles addressing this important subject include Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, — S. CAL. L. REV. (forthcoming Mar. 1995); Barbara J. Cox, *Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033; Joseph W. Hovermill, *A Conflict of Laws and Morals: The Choice of Law Implications of Hawaii’s Recognition of Same-Sex Marriages*, 53 MD. L. REV. 450 (1994); Deborah M. Henson, *Will Same-Sex Marriages Be Recognized in Sister States?: Full Faith and Credit and Due Process Limitations on States’ Choice of Law Regarding the Status and Incidents of Homosexual Marriages Following Hawaii’s Baehr v. Lewin*, 32 U. LOUISVILLE J. FAM. LAW 551 (1994); Thomas Keane, — STAN. L. REV. (forthcoming 1995).

Those who wish to help prepare for the recognition battles should contact Lambda’s Marriage Project Legal Clearinghouse, *supra* note 126.

As in any major civil rights effort, our struggle demands vision, strategy, courage, dedication, teamwork, patience, and luck. We are in this for the long haul, and ought to pace our efforts and choose our tactics accordingly. By working with a local or national organization, or sitting at home with a pen and paper, everyone can make an individual contribution to this nitty-gritty social change work—beginning by explaining why gay people should share, and be allowed to share, in the rights and responsibilities of marriage.¹⁹⁷

To disagree about forum, timing, rhetoric, or tactics does not necessarily mean disagreement over ultimate vision, just as we can disagree over the ultimate vision, and still march and work together on much along the way. King's advisor, Stanley Levison, was both right and wrong when he urged:

It is certainly poor tactics to present to the nation a prospect of choosing between equality and freedom for Negroes with the revolutionary alteration of our society, or to maintain the status quo with discrimination. The American people are not inclined to change their society in order to free the Negro. They are ready to undertake some, and perhaps major, reforms, but not to make a revolution.¹⁹⁸

He was right that such an all-or-nothing rhetorical formulation would have been a fatally poor tactic indeed, at least in a democracy. But, like the critics of our marriage work, he was wrong about what makes a revolution.

Having learned a lesson from the abortion rights and civil rights movements, activists in Hawaii did not stop their efforts to promote social change in the wake of our initial legal victory. Nor did they leave the work of creating change solely to the lawyers. *Baehr v. Lewin* engendered a broad coalition¹⁹⁹ and tremendous political activism that have truly begun a sea change throughout the social institutions of Hawaii. Such diligence and vigilance will remain necessary during the political cycles leading up to

197. Robert F. Kennedy described the importance of what may seem like drop-in-the-bucket efforts:

Few will have the greatness to bend history itself; but each of us can work to change a small portion of events, and in the total of all those acts will be written the history of this generation. It is from numberless diverse acts of courage and belief that human history is shaped. Each time a man stands up for an ideal, or acts to improve the lot of others, or strikes out against injustice, he sends a tiny ripple of hope, and crossing each other from a million different centres of energy and daring those ripples build a current which can sweep down the mightiest walls of oppression and resistance.

ARTHUR M. SCHLESINGER, JR., ROBERT KENNEDY AND HIS TIMES 745-46 (1978) (speech in South Africa).

198. GARROW, *supra* note 181, at 420.

199. See discussion *supra* note 122; Miller, *supra* note 59, at 34. As the *Equality Foundation* court noted, "[C]oalition building plays a crucial role in a group's ability to obtain legislation in its behalf." *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, No. C-1-93-773, 1994 WL 442746, at *8 (S.D. Ohio Aug. 9, 1994).

and following the final word of the Hawaii Supreme Court. Meanwhile, in the rest of the country, the work awaits us *now*.

CONCLUSION

Prior to *Baehr v. Lewin*, equal marriage rights for lesbians and gay men were something that most non-gay Americans were never called upon to think about seriously. While it is clear that most people easily dismissed marriage by same-sex couples when it seemed at most a hypothetical question, now it is about to be reality. Just as gay men and lesbians will have to examine the true value of our relationships to ourselves and society in a whole new way,²⁰⁰ so will all but the "willfull[y] blind"²⁰¹ in the non-gay world have to think through their commitment to equality, federalism, inclusion, fairness, and love. I believe we must enlarge, not sell short, our sense of the possibilities.

Again, the Hawaii experience is instructive.²⁰² Consider the following remarkable words, put forward not by a lesbian or gay activist, but by the (presumptively non-gay) voice of one of the two leading newspapers in Hawaii. Under the headline *State Should Drop Ban on Same-sex Marriage*, the editorial urges an end to efforts to thwart the ruling in *Baehr*:

There is no compelling reason for banning same-sex marriage. Rather, there is an emotional repugnance to homosexuality that is overwhelming rational consideration of this issue.

Homosexuality is condemned in some religions. To their adherents, same-sex marriage is a desecration of a holy rite. These people are of course free to hold such an opinion, but when they and other opponents lobby against government recognition of same-sex marriage they are trying to impose their private values

200. Having at last the same marriage option as different-sex couples will be an opportunity for many same-sex couples to fulfill a long-desired conception of their relationships and their place in society. For many other gay people, it will come as a jolt, forcing them to consider afresh how they feel about their life-plans, their values, and perhaps even their particular partners. Just as non-gay people have much to learn about gay people, *see, e.g.*, Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 LAW & SEXUALITY 133 (1991), and much to examine in how we as a society treat families and individuals in and out of marriage, so lesbians and gay men might benefit from the opportunity to think anew from the vantage point of greater inclusion.

201. *Bowers v. Hardwick*, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting). *See* Wolfson, *supra* note 32, at 38 n.69, 34 n.59.

202. *See* Ingrassia, *supra* note 174, at A1 (documenting the "wide[] acceptance" of the 1989 "registered partnership" law recognizing same-sex unions, even among those originally opposed). The *Wall Street Journal* reported that religious leaders and "even opponents say that the law resulted in no social ills." *Id.* While both Hawaii and Denmark are models of tolerance, and thus perhaps somewhat unrepresentative of parts of the American polity, they also offer a vision of what can be better, and thus might well inspire and summon the best.

on the law. Homosexuality is a moral and religious issue. It should not become [*sic*²⁰³] a political one.

Government must remain neutral on such intimate questions and focus on the need to protect the rights of the individual to equal treatment. Government recognition of same-sex marriage should not be confused with moral approval—which the state cannot give in any case. Dropping the ban would merely accept the rights of homosexuals to the same legal protection accorded heterosexuals, impairing no one's rights and conferring important financial and legal benefits that should not be withheld. . . .

In fact there is no legitimate reason whatever why the State should not recognize the right of homosexuals to marry, and the Supreme Court will probably so rule.

The real reason for opposition is simply disapproval of homosexuality, and that should not be accepted by the court.²⁰⁴

Perhaps where those against marriage and I part company is that I see this rhetoric itself as a breathtaking transformation. If these words, and the underlying victories they represent and presage, are the measure of the social change work my colleagues in the movement and I are doing, I am prepared to stand on them. Happily. And then get on with the work ahead.

203. As long as there is sexism, discrimination against lesbians and gay men, or a desire to enforce an ideology or structure of heterosexual superiority, "homosexuality" will be a "political" issue. See, e.g., *Gay Law Students Ass'n v. Pacific Tel. & Tel.*, 595 P.2d 592, 610 (Cal. 1979) ("[O]ne important aspect of the struggle for equal rights is to induce homosexual individuals to 'come out of the closet,' acknowledge their sexual preferences, and to associate with others in working for equal rights."); see also Law, *supra* note 94; Schneyer, *supra* note 105, at 1366 n.173 ("All weddings [gay and non-gay] are political acts (and ethical acts too), because they create communities and define relationships within those communities. We normally do not see this, because the communities and relationships are identical to those we are used to seeing. . . .") But on the key point here —separation of church and state—the newspaper's position on civil marriage rights for gay people is clearly correct.

204. *State Should Drop Ban on Same-sex Marriage*, HONOLULU STAR-BULLETIN, Feb. 4, 1994, at A12; see also *Same-Sex Marriage*, HONOLULU ADVERTISER, Feb. 21, 1994, at A6 ("[T]o provide underlying equality of civil rights . . . same-sex couples have as much right to a marriage license as any couple composed of a man and a woman.").

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